DOCUMENT RESUME

ED 111 049 95 EA 006 946

AUTHOR Turnbull, H. Rutherford, III
TITLE Legal Aspects of Educating the Developmentally Disabled. NOLPE Second Monograph Series on Legal Aspects of School Administration, No. 6. ERIC/CEM State-of-the-Knowledge Series, No. 31.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.; Oregon Univ., Eugene. ERIC Clearinghouse on Educational Management.
SPONS AGENCY National Inst. of Education (DHEW), Washington, D.C.
PUB DATE 75
CONTRACT OEC-0-8-080353-3514
NOTE 59p.
AVAILABLE FROM National Organization on Legal Problems in Education, 825 Western Avenue, Topeka, Kansas 66606 ($4.95)

EDRS PRICE MF-$0.7[illegible] HC-$3.32 Plus Postage
DESCRIPTORS Classification; Compensatory Education; *Court Litigation; Due Process; Educational Equality; Educational Practice; Elementary Secondary Education; Equal Education; *Exceptional Children; *Handicapped Children; Intelligence Tests; Legal Responsibility; *Mentally Handicapped; *Mental Retardation; School Administration; Special Education; State Legislation

ABSTRACT

A major development of the law in the 1970s has been the extension of the principle of egalitarianism to the developmentally disabled, particularly the mentally retarded. In recent years numerous judicial decisions have overruled the practices of school districts that have excluded developmentally disabled children from educational programs. This monograph examines these cases and discusses their underlying legal principles, including the emerging "right to education" and the Fourteenth Amendment rights to equal protection and due process. The implications of the cases are explained for school authorities, who must identify, evaluate, and place handicapped children in appropriate educational programs. State constitutional and statutory provisions for educating the handicapped that help to explain the development of the legal aspects of educating the developmentally disabled are also examined. The appendix contains proposals for state legislative action to respond to the judicially established right to education mandates. (Author/MLF)

ED111043

LEGAL ASPECTS OF EDUCATING THE DEVELOPMENTALLY DISABLED

H. RUTHERFORD TURNBULL III

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

1975

Commissioned by
ERIC Clearinghouse on Educational Management
University of Oregon
Eugene, Oregon 97403
Published by
National Organization on Legal Problems of Education
825 Western Avenue, Topeka, Kansas 66606

EA 006 944
$4.95
2

ANNOUNCING A NEW SERIES

LEGAL ASPECTS OF SCHOOL ADMINISTRATION SERIES

The following monographs constitute the second series of State-of-the-Knowledge papers jointly sponsored by the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education. Six monographs have been printed in this series, which is designated as the *Legal Aspects of School Administration Series:*

1. *Church State Relations: The Legality of Using Public Funds for Religious Schools*, by Dr. Michael R. Smith, assistant professor of education, Pfeiffer College and Dr. Joseph E. Bryson, director of extension, The University of North Carolina, Greensboro.

2. *Substantive Legal Aspects of Teacher Discipline*, by Dr. Floyd G. Delon, associate dean, College of Education, University of Missouri, Columbia.

3. *Public School Desegregation: Legal Issues and Judicial Decisions*, by Dr. H. C. Hudgins, associate professor, Department of Educational Administration, Temple University.

4. *Legal Aspects of Educational Choice: Compulsory Attendance and Student Assignment*, by Kern Alexander, professor, Department of Education Administration, University of Florida, Gainesville.

5. *School Property: The Legality of its Use and Disposition*, by Dr. Philip K. Piele, director, and James R. Forsberg, research assistant, ERIC Clearinghouse on Educational Management.

6. *Legal Aspects of Educating the Developmentally Disabled*, by H. Rutherford Turnbull III, professor of public law and government, Institute of Government, The University of North Carolina, Chapel Hill.

SERIES EDITORS

Dr. Philip K. Piele, Director, ERIC Clearinghouse on Educational Management

Dr. Marion A. McGhehey, Executive Secretary, NOLPE

DISCLAIMER

The material in this publication was prepared pursuant to a contract with the National Institute of Education, U.S. Department of Health, Education, and Welfare. Contractors undertaking such projects under government sponsorship are encouraged to express freely their judgment in professional and technical matters. Prior to publication, the manuscript was submitted to the National Organization on Legal Problems of Education for critical review and determination of professional competence. This publication has met such standards. Points of view or opinions, however, do not necessarily represent the official view or opinions of either the National Organization on Legal Problems of Education or the National Institute of Education.

ERIC/CEM State-of-the-Knowledge Series, Number Thirty-one
Clearinghouse Accession Number: EA 006 946

NOLPE

The National Organization on Legal Problems of Education (NOLPE) was organized in 1954 to provide an avenue for the study of school law problems. NOLPE does not take official positions on any policy questions, does not lobby either for or against any position on school law questions, nor does it attempt in other ways to influence the direction of legislative policy with respect to public education. Rather it is a forum through which individuals interested in school law can study the legal issues involved in the operation of schools.

The membership of NOLPE represents a wide variety of viewpoints—school board attorneys, professors of educational administration, professors of law, state officials, local school administrators, executives and legal counsel for education-related organizations.

Other publications of NOLPE include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, NOLPE SCHOOL LAW JOURNAL, YEARBOOK OF SCHOOL LAW, and the ANNUAL CONVENTION REPORT.

National Organization on Legal Problems of Education
825 Western Avenue
Topeka, Kansas 66606

ERIC and ERIC/CEM

The Educational Resources Information Center (ERIC) is a national information system operated by the National Institute of Education. ERIC serves educators by disseminating research results and other resource information that can be used in developing more effective educational programs.

The ERIC Clearinghouse on Educational Management, one of several such units in the system, was established at the University of Oregon in 1966. The Clearinghouse and its companion units process research reports and journal articles for announcement in ERIC's index and abstract bulletins.

Research reports are announced in *Resources in Education* (*RIE*), available in many libraries and by subscription for $42.70 a year from the United States Government Printing Office, Washington, D.C. 20402.

Journal articles are announced in *Current Index to Journals in Education*. *CIJE* is also available in many libraries and can be ordered for $50 a year from Macmillan Information, 216R Brown Street, Riverside, New Jersey 08075.

Besides processing documents and journal articles, the Clearinghouse prepares bibliographies, literature reviews, monographs, and other interpretive research studies on topics in its educational area.

ACKNOWLEDGEMENT

The author gratefully acknowledges the research and editorial assistance given by two law clerks at the Institute of Government, of the University of North Carolina, Chapel Hill: Susan Allan of Harvard Law School and Mary Cousar of Duke Law School.

H.R.T. III

FOREWORD

This monograph by H. Rutherford Turnbull III is the sixth in a series of monographs on the legal aspects of school administration. The monograph was prepared through a cooperative arrangement between NOLPE and the ERIC Clearinghouse on Educational Management. Under this arrangement, the Clearinghouse provided the guidelines for the organization of the paper, commissioned the author, and edited the paper for style. NOLPE selected the topic for the paper and published it as part of a monograph series.

In recent years numerous judicial decisions have overruled the practices of school districts that have excluded developmentally disabled children from educational programs. Mr. Turnbull examines these cases and discusses their underlying legal principles, including the emerging "right to education" and the Fourteenth Amendment rights to equal protection and due process. He also explains the implications of the cases for school authorities, who must identify, evaluate, and place handicapped children in appropriate educational programs.

Mr. Turnbull is an associate professor of public law and government in the Institute of Government at the University of North Carolina at Chapel Hill. He received his bachelor's degree from Johns Hopkins University in 1959, his bachelor's degree of laws from Maryland Law School in 1964, and his master's degree of laws from Harvard Law School in 1969.

Law and mental retardation are among Mr. Turnbull's primary areas of specialization. He acts as a legal consultant to numerous agencies in the field of special education, and he regularly serves as a speaker at meetings of professional organizations. Among his recent publications are two articles, "Deinstitutionalization and the Law," in the April 1975 issue of *Mental Retardation*, and "Effects of Litigation on Mental Retardation Professionals," in the winter 1975 issue of *Popular Government*.

Philip K. Piele, Director
ERIC Clearinghouse on
Educational Management

Marion A. McGhehey
Executive Secretary
NOLPE

TABLE OF CONTENTS

I. Introduction 1

II. The Constitutional Foundations 2

III. State Law on Right to Education 6

IV. The Target Population 7

V. School Practices That Deny Equal Opportunities to Handicapped Persons 10

VI. Legal Principles and Exclusionary Practices 12
- Equal Protection 13
- Substantive Due Process 20
- Procedural Due Process 22

VII. Dominant School Practices 26
- Exclusion 26
- Classification 27

VIII. Recent Changes in the Law 28
- Sources of the Change 28
- Changing Law 28

IX. Financial Impacts and Considerations 32

X. Implications and Implementation 34
- Identification, Evaluation and Placement 34
- Change in Priorities and Organization 36
- Due-Process Hearings 37

XI. Conclusion 39

XII. Appendix: Proposed Statutory Provisions: Special Education Law 40

XIII. Table of Cases 50

LEGAL ASPECTS OF EDUCATING THE DEVELOPMENTALLY DISABLED

Introduction

A major development of the law in the 1970s has been the extension of the principle of egalitarianism to the developmentally disabled,[1] particularly the mentally retarded. This principle—that all persons, however unequal they may be in terms of their development, should be treated equally in the sense of being granted equal opportunities—has been expressed in two different ways.

Many professionals, including educators, who deal with the developmentally disabled have advanced egalitarianism as the basis for "normalization"[2] in the treatment of the disabled. This term stands for the proposition that developmentally disabled persons should live and be treated as non-disabled persons to the greatest degree possible and that their differences from normal people can be reduced by minimizing the degree to which they are treated differently from normal persons. One step in minimizing differences is to recognize the claim that the disabled have a right to education equal to a normal person's right to education.

In the contemplation of the law, egalitarianism invokes the concept of equal protection. It gives rise to the argument that limiting the civil liberties of the disabled violates their constitutional rights to equal protection under the Fourteenth Amendment because there is no rational reason for imposing on them special burdens or limitations that are not imposed on normal persons. An extension of this argument is the assertion that the educational opportunities granted to the normal pupil are constitutionally required to be granted to the handicapped.

This monograph will focus on the development of the legal aspects of educating the developmentally disabled, with particular emphasis on the emerging "right to education" as established by a plethora of judicial opinions. To the extent that state constitutional and statutory provisions for educating the handicapped help to explain this development, they will be examined, but they are not the principal concern of this monograph.

1. The term "developmentally disabled" includes, without limitation, school-aged children who have cerebral palsy, learning disabilities or behavioral problems, or who are mentally retarded, epileptic, emotionally disturbed, hyperactive, physically handicapped, autistic, multiply handicapped, homebound, pregnant, deaf or hearing-impaired, language or speech-impaired, blind or sight-impaired, abused or neglected, or socially maladjusted. These children are commonly called "special" or "exceptional" children (the latter term also can include the gifted or exceptionally talented child). Hereafter, they will be referred to as retarded, handicapped, or developmentally disabled.

2. W. Wolfensberger & B. Nirje, The Principle of Normalization in Human Services (1972).

Nor are the responses of educators to the establishment of a right to education the subject of extended discussion. Undoubtedly, educators' attempts to comply with the court-ordered rights directly relate to the implementation of the right to education and the effectiveness of education, but separate treatment of those efforts is beyond the scope of this discussion.

The Constitutional Foundations

One of the high-water marks in judicial activism is the line made by the doctrine of equal protection. The negatively phrased constitutional precept of the Fourteenth Amendment that no state may deny to any persons within its jurisdiction the equal protection of the laws has produced a remarkable series of judicial results. Their total impact, though difficult to assess precisely at any given moment because it is always changing, is generally acknowledged to create a growing duty of government to take affirmative action to redress many types of governmentally caused inequalities among citizens.

One of these inequalities lies in the opportunity to be educated; among the victims of inequality have been the developmentally disabled. This monograph will later discuss how the Fourteenth Amendment has become the vehicle for redressing that inequality. Here, it is enough to note that the redress has been of very recent origin. Its original foundations, however, go back almost twenty years to *Brown v. Board of Education*[3] and come forward to date in a series of cases striking down state-created discriminations against many classes of disadvantaged persons. The principal cases involved the poor,[4] the illegitimate,[5] the alcoholic,[6] the narcotic user,[7] and the convict.[8]

Although *Brown v. Board of Education* established the right to an equal educational opportunity, based upon Fourteenth Amendment grounds, it was not until *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*[9] (hereinafter "PARC") and *Mills v. Board of Education of the District of Columbia*[10] (hereinafter "Mills") that *Brown* became meaningful for the developmentally disabled.

PARC was resolved by a consent decree (decree entered by consent

3. Brown v. Board of Educ., 347 U.S. 483 (1954).

4. Shapiro v. Thompson, 394 U.S. 618 (1969).

5. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), and Levy v. Louisiana, 391 U.S. 68 (1968).

6. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

7. Robinson v. California, 370 U.S. 660 (1962).

cited as PARC).

8. Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972).

9. Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter cited as PARC].

10. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972)

of all parties and the court) resting on the following findings:[11]

> 1. Expert testimony in this action indicates that . . . all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.
>
> 2. The Commonwealth of Pennsylvania has undertaken to provide a free public education to all of its children between the ages of six and twenty-one years, and further, has undertaken to provide education and training for all of its mentally retarded children.
>
> 3. Having undertaken to provide a free public education to all of its children, including its mentally retarded children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.
>
> 4. It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the general educational policy that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement to any other type of program of education and training.

The court-ordered changes in education for the retarded are comprehensive, to say the least. The state is required to locate and identify all school-aged persons excluded from public schools. Local school districts are required to provide thorough medical and psychological evaluations of excluded children, children in special education programs, and children who were to be placed in those programs. Local districts also are required to reevaluate each child in a special education program every two years and whenever a change in his program is planned.

The state and local school districts are required to place all retarded children in a "free public program of education and training appropriate to the child's capacity," with a preference for regular classes rather than special education. In addition, the state's Department of Public Welfare, insofar as it is charged with arranging for the care, training, and supervision of a child committed to it, is required to provide a program of education and training appropriate to the child's capacity. School districts are permitted to refuse to accept into or retain in the lowest grade of the *regular* primary school (as distinguished from the *special* primary school) any child who has not attained a mental age of five years.

Parents of handicapped children are excused from liability under the compulsory school-attendance statutes when, with the approval of the

11. PARC v. Commonwealth, 343 F. Supp. 279, 307 (E.D. Pa. 1972).

local school board and the secretary of education and upon a finding by an approved school psychologist, the parents choose to withdraw the child from school. School districts are enjoined from using the withdrawal provisions as a means of excluding handicapped children against the parents' wishes.

The compulsory school-attendance statutes were construed to mean only that parents of a child have a duty, when the child is between eight and seventeen years of age, to assure his attendance in an educational or training program. According to this interpretation, the statute did not limit access to free public education or training only to children aged eight to seventeen. Further, any school district that provides free preschooling to normal children under age six is prohibited from denying such schooling to retarded children under age six.

The state's tuition-maintenance statute (granting funds for payment of tuition at private schools) was construed to mean that any mentally retarded child is entitled to its benefits if he attends a private school. Previously, the statute was interpreted to require that the child be blind, deaf, cerebral palsied, brain damaged, or afflicted by muscular dystrophy for his tuition at a private school to be paid by the state, but *PARC* removed this restriction.

The statutory provisions for homebound instruction were construed to be available to retarded children even though the children may not also be physically handicapped or suffering from a short-term disability.

Finally, *PARC* established elaborate due-process proceedings for all cases in which there is to be a change in a child's "educational status" by way of assignment or reassignment. The proceedings apply to all reassignments—to regular education, to special education, to "no assignment," or from one type of special education to another—where the change is based on the fact that the child is or is thought to be mentally retarded.

Mills specified two provisions that must be met before any child eligible for a publicly supported education can be excluded from a regular school assignment because of any school rule, practice, or policy. First, the child must be provided adequate alternative educational services suited to his needs, including (if appropriate) special education or tuition grants. Second, a constitutionally adequate prior hearing must be held. Following the exclusion, the child's status and progress, and the adequacy of the educational alternatives provided him must be reviewed and examined periodically.

The District of Columbia was ordered to provide each child of school age a free and suitable publicly supported education, regardless of the degree of the child's mental, physical, or emotional disability or impairment. Disciplinary suspensions for any reason for longer than two days are enjoined unless the school authorities provide a child with a prior hearing and a continuation of his education while he is suspended.

The school authorities were ordered to provide suitable education

within thirty days to all handicapped children then known to the school authorities, and within fifty days to handicapped children who later come to the attention of the schools. The authorities also are required to advertise the availability of free public education for handicapped children, to identify previously excluded children and the reasons for their exclusion, to notify previously excluded children of their rights under the court order, and to evaluate the educational needs of all identified exceptional children.

They are required to file with the court a proposal for placing each child in a suitable educational program. The proposal was to include three features:

> The provision of compensatory educational services where required.
>
> A plan for identifying, notifying, assessing (evaluating), and placing the handicapped children.
>
> A report showing the expunction from or the correction of all official records of any of the plaintiffs with regard to past expulsions, suspensions, or exclusions effected in violation of the due-process requirements contained in the court order, together with a plan enabling the child to attach to his records any clarifying or explanatory information.

Finally, school authorities are required to comply with elaborate requirements for a due-process hearing.

It is significant that in neither *PARC* nor *Mills* did the defendants deny that they were under a duty to educate *all* children or that mentally retarded children can be educated. As noted more fully later, both cases rested on equal protection grounds.

In a series of cases that paralleled *PARC* and *Mills* and occurred nearly simultaneously, the right of institutionalized mentally handicapped persons to receive treatment was established.[12] These right-to-treatment cases were also grounded on the Fourteenth Amendment. They asserted the essential equality of the developmentally disabled and mentally ill and elicited favorable judicial responses to the protests against widespread discrimination and neglect practiced by states against the institutionalized victims of mental impairment. The conjunction of right-to-education and right-to-treatment cases was propitious, for each judicial development fed and encouraged the other.

Yet neither development was founded solely in equal protection concepts. In the right-to-education litigation, complex issues of substantive

12. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) and 344 F. Supp. 387 (M.D. Ala. 1972), *appeal filed sub nom.* Wyatt v. Anderholt, Civ. No. 72-2634 (5th Cir. Aug. 1, 1972); Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974); and N.Y.A.R.C. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). *Contra*, Burnham v. Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972), *appeal filed*, Civ. No. 72-3110 (5th Cir., Oct. 5, 1972), consolidated on appeal with *Wyatt*.

and procedural due process were raised, and courts frequently found that school authorities had denied either or both types of due process in dealing with the developmentally disabled. Indeed, the constitutional principles that give rise to the right to education are so inextricably entwined that it is rather artificial to try to separate them into discrete groupings. To say that complex legal issues are raised is to say the obvious.

State Law on Right to Education

The case law on the right to an education is not based solely upon federal constitutional arguments. And not surprisingly, the federal equal-protection and due-process agruments are not as likely to be a secure ground for establishing the right to education as is the guarantee of education imposed on the state by its constitution or statutes.

Nearly all state constitutions provide for education for the children in the state.[13] Many states also have enacted statutes guaranteeing education to all children or to all exceptional children.[14] In examining these constitutional or statutory provisions in light of a claim that handicapped children have been illegally excluded from education, the courts generally have interpreted these provisions as guaranteeing education to *all* children of the plaintiff class.[15]

Compulsory attendance laws also reflect an undertaking by the state to provide education to all children in the state.[16] After noting that failure to comply with the District of Columbia compulsory attendance law constitutes a criminal offense, the court in *Mills* said: "The Court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children."[17]

Many of the recently enacted statutes guaranteeing education to all children or to all exceptional children seem to be in response to litigation that had been brought against the state or a school district within the state. Legislation enacted in Michigan in 1971 rendered moot the complaint in *Harrison v. State of Michigan*.[18] The court stayed pro-

13. Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 Ohio St. L. J. 554, 570 (1973).

14. *See* Education Commission of the States, Handicapped Children's Education Project, Final Report, Special Education in the States (1974).

15. Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct. Baltimore Cty., filed May 3, 1974); Doe v. Milwaukee Bd. of School Directors, Civ. No. 377-770 (Cir. Ct., Milwaukee Cty., 1970); Wolf v. Legislature of Utah, Civ. No. 182464 (3d Dist., Salt Lake Cty., Jan. 8, 1969); Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971); In the Interest of G.H., Civ. No. 8930 (Sup. Ct., N.D., filed April 30, 1974); *In re* Held, Nos. H-2-71 and H-10-71 (Fam. Ct., Westchester Cty., N.Y., filed Nov. 29, 1971).

16. PARC v. Commonwealth, 343 F. Supp. 279, 309-310 (E.D. Pa. 1971).

17. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 874 (D.D.C. 1972).

18. Michigan Public Act No. 198 (1971); 350 F. Supp. 846 (E.D. Mich. 1972).

ceedings in *Panitch v. Wisconsin*[19] while awaiting implementation of recent legislation. And the federal court abstained in *Florida Association for Retarded Children v. State Board of Education*[20] pending a determination by a state court whether remedies were available to the plaintiffs under new state law.

It is to be expected that state legislation requiring inclusion of all exceptional children in education could have a more far-reaching and positive effect than court-ordered inclusion. It is perhaps too early to tell what the result of either court orders or legislation will be, but implementation of both has been slow and irregular. Suit was brought in Tennessee to force initiation of the programs called for by legislation enacted in 1972, and other states also seem to be lagging well behind their intended implementation deadlines.[21]

The Target Population

The major initial difficulties in providing education to the mentally handicapped are caused by the size and characteristics of the population now required to be educated.

There is no general agreement about the size of the target population—the number of handicapped school-aged persons in the United States—except that it is large. The National Association for Retarded Citizens (NARC) estimates that 3 percent of the general population (all ages) is retarded. This means that 6.1 million persons are retarded, of whom 2.4 million are under the age of 21.[22] The Bureau of Education for the Handicapped, using figures supplied by state departments of education, estimated that in the school year 1968-69, over 7,000,000 school-aged (5-19 years) persons were retarded.[23] Another estimate asserts that handicapped children constitute between 8.7 and 35 percent of the entire school-aged population.[24] Still another estimate is that 9.2 percent (or 5,060,000) children (5-18 years) are handicapped.[25]

19. No. 72-C-461 (E.D. Wis., filed Aug. 14, 1972).

20. Civ. No. 73-250-250-Civ. (S.D. Fla., filed Feb. 5, 1973).

21. Special Education Act of April 1972; Rainey v. Watkins, Civ. No. 77620-2 (Ch. Ct., Shelby Cty., Tenn., filed April 5, 1973). *Accord* Panitch v. Wisconsin, Civ. No. 72-C-461 (E.D. Wis., filed Aug. 14, 1972). A refusal to dismiss because of mootness also was reached in Colorado Ass'n for Retarded Children v. Colorado, ___ F. Supp. ___ (D. Colo., filed June 14, 1974). *Contra*, Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972). For problems encountered following *PARC*, *Mills*, and recent California decisions, *see* N. Y. State Comm'n, Report on the Quality, Cost and Financing of Elementary and Secondary Education. 9 B.2 (1972), cited in Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 Cal. L. Rev. 40 (1974) [hereinafter cited as Kirp, *Legal Reform of Special Education*].

22. National Association for Retarded Children, Facts on Mental Retardation 6 (1973).

23. Cited in L. Lippman, & I. Goldberg, Right to Education vi (1973).

24. Kirp, *Legal Reform of Special Education*, 62 Cal. L. Rev. 40, 41 (1974).

25. National School Public Relations Association, Educating Children with Special Needs (1974).

There are several reasons why the estimates vary. The term *handicapped* can include a variety of disabilities. Handicapped children can include those who are blind or visually disabled, deaf or hard-of-hearing, physically disabled, emotionally disturbed, mentally retarded, or those who have speech impediments, learning disabilities, or multiple handicaps. The term *exceptional children* includes all of these and also gifted children.

Many of the handicapped or special children have not been identified, and many children who have been identified as handicapped may have been improperly identified as such. A proper diagnosis is difficult in some cases. Finally, no thorough census of the school-aged population has been undertaken. Yet the general size of the target population is generally agreed upon.

So, too, are the characteristics of the population. Of the mentally retarded—who have been the focus of most major recent litigation on the issue of a right to an education—NARC estimates[26] that the vast majority are "educable," the next largest segment is "trainable," and only approximately 5 percent of all retarded persons (school aged and above) are profoundly or severely retarded and require extensive supportive services. No study of the retarded population concludes that any retarded person, however disabled, is incapable of benefiting from instruction and from moving from relative dependence to relative independence.[27]

Even more disturbing than the estimates of the number of handicapped persons in the total population are the estimates of the number who are not served at all, or are inadequately served, by a public school or other educational program. The Bureau of the Census reported that in the school year 1968-69 approximately 450,000 children in the 6-15 age group were not enrolled in schools. This figure excludes children in institutions, who, if they were included, could make the figure considerably higher.

In the same period, the Bureau of Education for the Handicapped found that 3,751,571 handicapped children—approximately 62 percent of the nation's total—were not receiving special education.[28] In 1969, the President's Committee on Mental Retardation found that approximately 60 percent of the nation's mentally retarded children received no education at all.[29]

Moreover, it is not uncommon for children in institutions to receive

26. *Profound* (IQ 0-20): 1.5% of total population, or 92,000 persons of all ages and 36,000 persons under age 21. *Severe* (IQ 20-35): 3.5% of total population, or 214,000 persons of all ages, and 84,000 persons under age 21. *Moderate* (IQ 36-52): 6% of total population, or 366,000 persons of all ages and 144,000 persons under age 21. *Mild* (IQ 53+): 89% of total population, or 5,400,000 persons of all ages, and 2,100,000 persons under age 21. NATIONAL ASSOCIATION FOR RETARDED CHILDREN, *supra* note 22.

27. Kirp, *supra* note 24.

28. LIPPMAN, *supra* note 23.

29. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION [hereinafter cited as PCMR] MR '69: TOWARD PROGRESS 18 (1969).

little or no special education.[30] Indeed, it is widely accepted that most handicapped children receive no educational services at all or only inappropriate educational services.[31] Racial minority groups and the economically disadvantaged, among whom the incidence of retardation is disproportionately high,[32] are most likely to be among those who receive no services or inadequate services.[33] Finally, none of these data take into account the quality of special educational services.

As is apparent, the goal of providing educational services to the handicapped is complicated at the outset by four major problems:

> Definition—What is a handicap? and To what extent is a disability handicapping?
>
> Identification—Who are handicapped? What are their problems? How many of them are there? and What programs are the handicapped receiving, if any?
>
> Methodology—How is an identification made in an individual case? and How are aggregate identification data collected?
>
> Accuracy—How accurate are the data?

The initial major difficulty, then, is the target population itself. In sheer numbers, the retarded represent a staggeringly large group; among themselves, they differ widely and require a variety of different services to ensure that an equal and appropriate educational opportunity is afforded to each retarded person. These are the almost overwhelming facts that courts and educators must first confront.

Moreover, they must confront these facts in face of the assertion, previously made by educators alone but now accepted by the courts, that all retarded persons can profit from a program of formal education, instruction, and training. The profoundly or severely retarded persons (IQ less than 35) generally require almost constant supervision, but they are nevertheless capable of developing self-help skills and achieving some form of independence.[34] Yet the typical school practice has been to totally exclude the children in this category from any educational service or to provide only token services,[35] even though it is still unclear whether these children can or should be enrolled in regular public schools.

30. Kirp, *supra* note 24, at 42, and LIPPMAN, *supra* note 23.

31. Kirp, *supra* note 24, and Note, *The Right of Handicapped Children to An Education: The Phoenix of Rodriguez*, 59 CORN. L. REV. 519 at nn. 1, 4 and 5 (1974).

32. Young, *Poverty, Intelligence and Life in the Inner City*, 7 MENTAL RETARDATION 24, 25 (1969); PCMR, THE DECISIVE DECADE 4 (1970); PCMR, THE EDGE OF CHANGE 19 (1969); PCMR, ENTERING THE ERA OF HUMAN ECOLOGY 23 (1971).

33. Kirp, *Schools as Sorters*, 121 PA. L. REV. 705, 760 (1973).

34. NATIONAL ASSOCIATION FOR RETARDED CHILDREN, *supra* note 22, at 4.

35. *See e.g.*, Tidewater Ass'n of Autistic Children v. Tidewater Bd. of Educ., Civ. No. 426-72-N (E.D. Va., filed Dec. 26, 1972).

The trainable mentally retarded person (IQ 36-52)[36] faces a future of life in supervised surroundings—special education, sheltered workshops, and group homes—but can develop the ability to take care of himself in some routine activities, achieve some economic productivity, and adjust to community (noninstitutional) living.[37] The educable mentally retarded person has the capacity to cope with a modified regular school curriculum, work, marry, and live in a community.[38]

Typically, the trainable and educable mentally retarded school-aged persons are either wholly excluded from schooling or furnished with inadequate or inappropriate educational services. The educable mentally retarded make up the greatest portion of the retarded population, and the trainable mentally retarded constitute the second largest segment. Because of their large numbers and because they together represent the group most capable of profiting from education, it is their interests that have been at issue in most litigation challenging various school exclusionary or discriminatory practices. They are not, however, the sole beneficiaries of the successful litigation.[39] It is now appropriate to examine these discriminatory practices.

School Practices that Deny Equal Educational Opportunities to Handicapped Persons

School systems have been ingenious and highly successful in denying equal educational opportunities to handicapped school-aged children. Their success is evidenced not only by the data showing how many persons are excluded but also by the multitude of types of exclusionary practices.

The schools have to a large degree excluded handicapped school-aged persons, either individually or as a class.[40] In some cases, they have afforded only token or partial inclusion, admitting some but not all individuals or some representatives of a class.[41] They have been

36. PCMR, Report of the Task Force on Education and Rehabilitation 33, 34 (1962); National Association for Retarded Children, *supra* note 22.

37. National Association for Retarded Children, *supra* note 22, at 4.

38. *Id.*

39. In Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972), the plaintiffs included mentally retarded children as well as those with behavioral problems and who are emotionally disturbed and hyperactive.

40. *See, e.g.*, Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 868, 875 (D.D.C. 1972); PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 282, 296 (E.D. Pa. 1972); Wolf v. Legislature of Utah, Civ. No. 182464, (3d Dist., Salt Lake Cty., filed Jan. 8, 1969); Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974); North Carolina Ass'n for Retarded Children v. North Carolina, Civ. No. 3050 (E.D.N.C., filed May 18, 1972); and Tidewater Ass'n of Autistic Children v. Tidewater Bd. of Educ., Civ. No. 426-72-N (E.D. Va., filed Dec. 26, 1972).

41. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 871, 875 (D.D.C. 1972); PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 282 (E.D. Pa. 1972); Tidewater Ass'n of Autistic Children v. Tidewater Bd. of Educ., Civ. No. 426-72-N (E.D. Va., filed Dec. 26, 1972).

guilty of misclassification,[42] incorrectly identifying some persons as handicapped who should have been classified as "normal," or incorrectly labeling these persons as being subject to one type of handicap when they suffer another handicap.

The schools have failed to provide adequate funding of tuition-subsidy programs to enable handicapped persons to purchase appropriate education from alternative sources when such education is not provided by the school system of the person's place of residence (district or state).[43] Because more appropriate programs were not available,[44] they have placed handicapped pupils in special education programs that were inappropriate for them. Because of a shortage of special education programs, they have created waiting lists for admission to the few available programs, thus excluding many eligible pupils.[45]

The schools have created different admission policies for the handicapped.[46] They have failed to reevaluate and reclassify[47] students who have been labeled as retarded.[48] They have not provided even a modicum of procedural due process in classification matters.[49] They have placed handicapped pupils in situations in which virtually no program of instruction is available.[50] They have excluded retarded children on the grounds that they create behavioral or disciplinary problems.[51] Finally, they have limited the number of students that can be enrolled in special education programs by using incidence pro-

42. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 295 (E.D. Pa. 1972); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Diana v. State Bd. of Educ., C-70-37 R.F.P. (N.D. Cal., filed Jan. 7, 1970 and June 18, 1973); Stewart v. Phillips, Civ. No. 70-1199-F (D. Mass., filed Sept. 14, 1970); Guadalupe Org. v. Tempe Elem. School Dist. No. 3, Civ. No. 71-435 (D. Ariz. 1972).

43. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 286 (E.D. Pa. 1972); Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

44. Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

45. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 868 (D.D.C. 1972); LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Reid v. Board of Educ. 453 F.2d 238 (2d Cir. 1971); David P. v. State Dep't of Educ., Civ. No. 658-826 (S.F. Super. Ct., filed April 9, 1973).

46. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 282 (E.D. Pa. 1972); Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 874 (D.D.C. 1972).

47. On the matter of classification, *see* text at note 121, *infra*.

48. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 875 (D.D.C. 1972); PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972); LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

49. PARC v. Commonwealth, 343 F. Supp. 279, 293 (E.D. Pa. 1972); LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 871 (D.D.C. 1972).

50. PARC v. Commonwealth, 343 F. Supp. 279, 296 (E.D. Pa. 1972); Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

51. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 878, 880, 882 (D.D.C. 1972), and Flaherty v. Connors, 319 F. Supp. 1284 (D. Mass. 1970).

jections that bear little relation to the actual number of the handicapped in the school district[52] or by restricting state-level funding for hiring of special education teachers on the local level by artificial quotas (for example, one state-paid teacher for every twelve pupils in each special education class).[53]

There are many reasons why the schools have been guilty of these education-limiting practices. The cost of educating or training the special child is normally higher than the cost of educating the normal child.[54] Resources for the handicapped—manpower, money, and political clout—are limited absolutely and relatively compared with the same resources for normal children.

Some educators and their funding sources have believed that the retarded are not educable, certainly not in the traditional sense. The time-honored "reading-writing-arithmetic" philosophy of education has militated against education for the retarded. There seems to be no consensus among educators on how to educate the handicapped; in addition, little is known about the efficacy of special education.[55] The bureaucratic structure of special education (separated from the mainstream of education) and the presence of vested interests (among both special educators and their counterparts in mainstream programs) tend to diminish the equality of educational opportunities for handicapped persons.[56]

Once a child is placed in a special education program, there is little incentive to return him to a normal program.[57] Special educators' lower expectations of retarded pupils tend to make placement in special education permanent,[58] relegating a child designated as retarded to the disadvantaged sector of public education.

Finally, special education serves valued escape-hatch purposes, permitting schools to classify as handicapped the children considered undesirable—the racial minorities, the disruptive, and the different.[59]

None of the practices that deny equal educational opportunities for the handicapped, and few of the reasons behind the practices, have escaped attack in recent litigation. It is appropriate now to examine in detail the legal principles underlying the litigation and then the application of these principles to various exclusionary practices.

Legal Principles and Exclusionary Practices

The recent attacks on the many exclusionary practices focus on the

52. David P. v. State Dep't of Educ., Civ. No. 658-826 (S.F. Super. Ct., filed April 9, 1973).

53. North Carolina's Department of Public Education allocates funds to local units, to be used for hiring special education teachers, on the basis of 12 handicapped children per classroom.

54. Comment, *supra* note 13, at 554, 559.

55. Kirp, *supra* note 24, at 40, 44-45.

56. *Id.* at 45.

57. *Id.*

58. *Id.*

59. *Id.* at 48.

importance of education, its protected status under *Brown v. Board of Education*[60] and subsequent cases, and its entitlement to favored treatment both under the Fourteenth Amendment's equal-protection and due-process clauses and under state constitutional and statutory provisions.

As *Brown* is a wellspring of litigation for many other cases related to education, so it is for cases asserting a right to education for the handicapped. In holding that racial discrimination in public schools violates Fourteenth Amendment equal-protection guarantees, the *Brown* Court discussed the importance of education in terms [61] that have been quoted or cited with approval in nearly every subsequent related case.[62] Its statements of "the importance of education to our democratic society" and the relationship of education to "the performance of our most basic public responsibilities" led the Court to conclude that the opportunity of an education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[63]

These statements also have led to later arguments that education is a constitutionally protected interest because it is essential to a meaningful exercise of such explicitly protected constitutional rights as freedom of speech and association under the First Amendment and the meaningful exercise of "the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the state has adopted an elective process for determining who will represent any segment of the State's population."[64] Accepting these arguments, the Supreme Court of California in *Serrano v. Priest*[65] found education to be a "fundamental interest" protected by the Constitution. But no federal court has so held, and the United States Supreme Court intimated to the contrary in its ambiguous decision in *San Antonio Independent School District v. Rodriguez*[66] (hereinafter cited as *Rodriguez*), consolidating *Serrano* in its disposition of *Rodriguez*.

Equal Protection

The challenges to the denial of public education to the handicapped that are founded on the most comprehensive grounds and cover the widest range of discriminatory practices are those brought under the equal-protection clause and in reliance on the *Brown* assessment of the value of education. The claim is, essentially, that the plaintiffs have

60. 347 U.S. 483 (1954).
61. 347 U.S. 483, 493 (1954).
62. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973).
63. 347 U.S. 483, 493 (1954).
64. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 and note 78 (1973).
65. 5 Cal. 3d 584, 487 P.2d 1241 (1971).
66. 411 U.S. 1 (1973).

the same rights to education as other children. This claim has two parts.

First, the complaint may be that there is differential treatment among and within the class (all developmentally disabled children)—that is, that some are receiving education (or a certain type of education) while others are not. In this instance, the violation of equal protection consists of the irrationality in providing or denying education to persons who are similarly classified by reason of being developmentally disabled. The requested remedy is that all such children be given an education.[67]

And second, the complaint may be that some handicapped children are not provided with an education while "normal" children are. Here the violation consists of the irrationality in providing or denying education to persons who are similarly classified by reason of being school-aged citizens. The requested remedy is that all children, including the handicapped, be included in public education systems.

Until the era of the Warren Court, the application of equal-protection guarantees to claimed violations of individual rights usually resulted in a finding that the governmental action was above constitutional reproach. When the "traditional" equal-protection analysis failed to yield results that corrected obvious abuses of individual rights, the Warren Court fashioned the "new equal protection" analysis. Which of the two equal-protection analyses it applied depended principally on the nature of the complaining party, the nature of the complainant's interest or the right being infringed upon by the government, and the ability of the government to justify its action.

Under the "new equal protection" concept, if the case involved a "suspect classification" or impinged on a "fundamental interest," the Court subjected the classification to "strict scrutiny" and required the state to show a "compelling interest."[68] Under the strict-scrutiny standard, the state bears the burden of establishing not only that it has a compelling interest—one that justifies the law by whose authority it acted—in the subject at issue (the complainant's right or interest) but also that the distinctions drawn by the law are necessary, not merely convenient, to achieve its purpose.

If no fundamental interest or suspect classification was involved, the Court resorted to the traditional analysis—the "rational basis" standard. The Court asked only whether the ends or purposes sought are

67. Both types of equal protection claims were made in LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973) and Brandt v. Nevada, Civ. No. R-2779 (D. Nev., filed Dec. 22, 1972). The claim of equal treatment within the class of developmentally disabled children is made in Doe v. Milwaukee Bd. of School Directors, Civ. No. 377-770 (Cir. Ct., Milwaukee Cty., 1970) and Association for Mentally Ill Children v. Greenblatt, Civ. No. 71-3074-J (D.C. Mass., filed Dec. 30, 1971).

68. *E.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion that sex is a suspect classification); Graham v. Richardson, 403 U.S. 365 (1971) (alienage as suspect classification); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel as fundamental interest); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy as suspect classification); and Loving v. Virginia, 388 U.S. 1 (1967) (race as suspect classification).

legitimate state purposes, and whether there is a substantial and rational relationship between the ends or purposes and the particular classifications. A state practice was much more likely to survive an equal-protection attack under the rational-basis test than under the strict-scrutiny test.

It is necessary to be aware of these equal-protection analyses in order to understand how a claim of equal protection is generally made and might be resolved. But that awareness may only confuse the person who reads the recent right-to-education cases, which generally lack a clear or formal equal-protection analysis. Typically, the courts expressly cite the equal-protection clause, generally with an accompanying reference to *Brown*, but fail to state whether education is a "fundamental interest" or whether the developmentally disabled plaintiffs represent a "suspect classification," and they do not specify which equal-protection test they finally apply.[69]

The failure to apply equal-protection analyses rigorously undoubtedly was originally caused by the resolution of *PARC* by consent decree and the disposition of *Mills* under Fifth Amendment due-process principles. Moreover, when *PARC* and *Mills* were concluded, approximately a year before *Rodriguez*, it was not so apparent that it was necessary to decide whether education was a "fundamental" interest or a right in the usual constitutional sense (voting[70] and access to the courts[71] have been held to be such rights). Such a decision seemed not to be pressing, because the courts had frequently attested to the importance of education.[72]

In any event, the courts in both *PARC* and *Mills*, citing legal and sociological authorities to support their findings that education is essential to enable a child to function in society and that *all* children can benefit from education, applied equal-protection and due-process guarantees to furnish this important right to the developmentally disabled claimants. But neither court engaged in further legal analysis, and each was content to make the bold assertion of fundamental interest as the constitutional foundation for striking down school policies denying education to the handicapped. *Mills*, citing *Brown* and *Hobson v. Hansen*,[73] concluded:

69. This lack of analysis is especially true of Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972). In following *Mills*, subsequent cases have emulated the form of its decision, including the lack of formal legal reasoning.

70. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

71. Douglas v. California, 372 U.S. 353 (1963).

72. *Rodriguez* explicitly says that even though the right to education may be very important, that does not mean it is fundamental:

"Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted. [337 F. Supp., at 283.] But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for the purpose of examination under the Equal Protection Clause." 411 U.S. 1, 30 (1973).

73. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

> In *Hobson v. Hansen, supra*, Judge Wright found that denying poor public school children educational opportunities equal to that available to more affluent public school children was violating the Due Process Clause of the Fifth Amendment. *A fortiori*, defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.[74]

Subsequent cases have closely followed *PARC* and *Mills* in the arguments made, in both the form of the decision and the relief granted. But to date no court has made a careful legal analysis of the equal-protection issues as applied to the developmentally disabled pupil.

Despite the attempts to fit the rights of handicapped children to equal educational opportunities into one of these two constitutional molds,[75] and despite the unquestionable application of either of the two equal-protection analyses to many exclusionary or discriminatory school practices,[76] it may be futile to try to fit the right into a neat constitutional mold, from the standpoint of both achieving judicial relief and fashioning useful constitutional principles. One writer has pointed out the need for a carefully reasoned analysis of legal principles with respect to school classification practices.
His observations also tend to apply forcefully to other school practices that deny equal educational opportunities to handicapped children:

> That certain school classifications—exclusion, special education, and slow track placement—do not benefit and may well injure students readily evokes the policy conclusion that such sorting is educationally dubious practice. Yet bad policy is not necessarily, or even usually, unconstitutional policy. If the transition could be so effortlessly made, courts would in fact function as superlegislatures. If, however, the interests at stake are sufficiently closely linked to constitutionally guaranteed rights, or the class of persons asserting discrimination is demonstrably vulnerable to majoritarian abuse, then the claim that particular policies operate inequitably becomes more susceptible to judicial analysis; judicial deference to legislative judgment gives way to careful examination of competing interests. In a challenge to school sorting, the bases for such judicial treatment are two: 1) the inequitable deprivation of education, an important, if not a "fundamental" interest; 2) the status of children, a class of individuals who deserve the protection of the courts in securing their rights.
>
> The nature of the inquiry says rather interesting things about the process of constitutional analysis and adjudication. The process depends upon the accretion of normative judgments concerning such concepts as fundamentality and protected classes, judgments not typically hospitable to empirical evaluation. It may well be that the derivation of principled standards, untested (and often untestable) against empirical evidence, is all that constitutional review ought to undertake. Yet the run of legal labels that advocates on either side typically advance do not materially promote reasoned analysis. It seems equally unhelpful to assert that education is a "fundamental interest" (in order to justify an alteration of prevailing practice) or that education is merely a publicly provided service (giving judicial warrant to the uncritical preservation of inequities). In each instance, the label negates analysis. The complexity of the school classification issue demands careful review and balancing of the competing in-

74. 348 F. Supp. 866, 875 (D.D.C. 1972).
75. Note, *supra* note 31.
76. Kirp, *supra* note 33, at 705.

terests—those of the child and of the school—not result-oriented legal shorthand.[77]

Rodriguez. Apparently standing squarely in the way of further application of equal-protection principles to the schools' exclusionary or discriminatory practices with respect to handicapped children is *San Antonio Independent School District v. Rodriguez*.[78] In this case the Supreme Court upheld the constitutionality of the Texas school-financing systems against Fourteenth Amendment equal-protection challenges. Yet the appearance is greater than the reality; on careful examination *Rodriguez* poses few major barriers to equal-protection claims by handicapped school-aged persons.

Rodriguez concerned intrastate financing of local school districts. The student plaintiffs made two allegations: First, since they were residents of "poorer" school districts than were students in other districts throughout the state, they were being unconstitutionally discriminated against because of their relative absence of wealth (a "suspect classification"), calculated by a state-financing scheme that made local school district financing dependent largely on the tax base of the district. Second, the state-financing scheme is subject to the new equal-protection strict-scrutiny standard since education is a fundamental interest. The Court not only rejected the contention of wealth discrimination, but also, after defining a fundamental right as one explicitly or implicitly guaranteed by the Constitution, found that education is not one of those rights.[79]

But the Court left undecided the issue whether "some identifiable quantum of education is a constitutionally protected requisite to the meaningful exercise of either right [freedom of speech or the right to vote]."[80] Thus the Court suggested that although a Fourteenth Amendment attack on the relative inequalities of educational opportunities most likely would be rejected, a similar attack on "an absolute denial of educational opportunities to any of [a State's] children"[81] on the ground that "the [financing] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process"[82] would be favorably received.

Rodriguez distinguished between (1) facts showing a poorer quality of education caused by a noninvidious classification based on the relative wealth of the school districts and (2) facts showing a total denial of education. This distinction has crucial implications for the pursuit of equal educational opportunities for the handicapped under equal-protection principles. *Rodriguez* plainly states that a relatively lower-quality education will not be grounds for a successful equal-protection

77. *Id.* at 737-8.
78. 411 U.S. 1 (1973).
79. *Id.* at 1, 35.
80. *Id.* at 1, 36-37.
81. *Id.*
82. *Id.*

attack. But the case leaves open the possibility that the total exclusion of handicapped persons from any schooling (a practice widely practiced by school systems) may be successfully challenged, since total exclusion represents an absolute—not a relative—denial. Moreover, absolute denials may be occasioned by other school practices, in either individual or class situations.

In addition, *Rodriguez* required a showing that the school system "fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[83] This language clearly leaves open the possibility of an equal-protection attack on school classification/tracking practices. Many of these practices cannot be justified in individual cases and tend to segregate a student from an opportunity to acquire the "basic minimal skills" necessary for effectively exercising speech and voting rights.

Rodriguez may perhaps also permit a successful challenge to the quality of the educational opportunity provided in a special education program. Such a challenge could be constructed on the grounds that neither the original classification nor the subsequent "remedial" or "special" program can be justified as being effective in producing the "basic minimal skills" necessary for the exercise of constitutional rights: of course, the student must be assumed capable of developing such skills. This attack would be consistent with the requirement of "appropriate" education. It would, however, be unavailable to profoundly and severely retarded students who are incapable of developing those skills. Since these students' own innate incapacity cannot be overcome by school/educational intervention, such intervention can hardly be said to fail to meet the constitutional standard.

Another distinction between the *Rodriguez* plaintiffs and severely retarded plaintiffs that may also preserve the availability of the equal-protection attack is the difference between the impingement or harm that the state causes by providing a less well-financed education and the damage it does—through stigmatization and self-limiting special education—by wrongly classifying a person as retarded and assigning him to special programs.

Moreover, it is entirely possible that the "suspect classification" criteria of *Rodriguez* ("the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"[84]) may well be applicable to the handicapped pupil. If this were the case, the new equal-protection analysis—or at least a more recent if less rigid application of it—might be applied to redress exclusionary or discriminatory school practices. This possibility is all the more likely to occur if the practices are such that they totally exclude a pupil or fail to live up

83. *Id.*
84. *Id.* at 28.

to the "qualitative" or "basic minimum skills" tests set out above.

Finally, the abandonment in *Rodriguez* of the "fundamental interest" analysis does not seem to have been logically or consistently followed in subsequent cases. In several post-*Rodriguez* decisions, the Court has indicated its willingness to weigh competing state and individual interests more carefully and exactly, suggesting that considerations of fundamental interest may become the dominant factor.[85] If this were to become the accepted analysis, it would probably be applied to certain school practices with respect to the handicapped more successfully than the "traditional" or "new" equal-protection analyses have been applied. The fact of racial segregation[86] in special education will only strengthen these arguments, invoking the *Brown* line of cases and their useful constitutional characteristics.

The "access" theory. Recent cases have demonstrated a change in the application of equal-protection guarantees with regard to education. *Brown* and other cases concerned with racial segregation in education interpreted equal protection as requiring equal access to the same resources. Typically they ruled that once the school systems provide facilities to white children, exactly the same facilities (and not an equivalent or separate set of facilities) must be made available on the same terms to children of a racial minority. The theory of equal protection in the recent right-to-education cases has been somewhat different and is best characterized by the doctrine "equal access to differing resources for differing objectives."[87]

Under this doctrine, the "right to education" means that the school systems must provide *all* children equal opportunities to develop their own capabilities; the school systems thus are required to provide different programs and facilities for pupils with different needs, according to their needs. The new access doctrine is reflected in *Mills*,[88] *PARC*,[89] and *LeBanks*,[90] which require not merely that the plaintiffs be provided with public education but also that the education be "appropriate" to their capacities or "suited to their needs."

The earlier *Brown* theory of equal protection, however, has not been altogether abandoned. Cases challenging the placement of disproportionate numbers of minority students in classes for the mentally retarded are, in a sense, demanding that the minority group be given "equal access to the same resources," that is, *Brown*-type access. In such cases, the *Brown* theory is being used to expand educational opportunity.

But when this theory could be applied in a way that would allow school systems to restrict educational opportunity and fail to furnish

85. *See* Kirp, *supra* note 33, at 705, 722.

86. *Id.* at 722-3.

87. Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYR. L. REV. 1037, 1056 (1972).

88. 348 F. Supp. 866, 878 (D.D.C. 1972).

89. 343 F. Supp. 279, 302, 307 (E.D. Pa. 1972).

90. LeBanks v. Spears, 60 F.R.D. 135, 140 (E.D. La. 1973).

appropriate or suitable education on the basis that they are furnishing equal access to the same resources, it tends to be rejected. For example, the plaintiffs in *Lau v. Nichols*[91] argued that education had been effectively denied to Chinese-speaking children because the public schools taught only in English; that is, they claimed that equal protection required that the school program take account of the children's inability to understand English. The Ninth Circuit Court of Appeals[92] responded with an "equal access" theory of equal protection, saying that there is no denial of equal protection because all children are given equal access to the standard English-taught curriculum available to other students.

The United States Supreme Court, however, reversed the decision. The Court's opinion closely paralleled the equal-protection arguments in the recent right-to-education cases in its statements that the school practices deny a meaningful opportunity for education. However, the Court decided the case solely on the basis of § 601 of the 1964 Civil Rights Act (prohibiting racial discrimination in any federally assisted educational program) and did not reach the equal-protection issue.

The disposition of *Lau* on nonconstitutional grounds may be the cue for later litigation, suggesting that state or federal statutory grounding of a claim to appropriate education is more likely to be favorably received. But *Lau* by no means undercuts the new access theory; if anything, it strengthens the theory by dicta acknowledging the necessity of appropriateness and meaningfulness of educational opportunity.

The keystone of the current equal-protection theory is that each child be given a full and meaningful opportunity to develop his individual capacities. In some cases this may require "mainstreaming"—putting a retarded child into a regular classroom if that is where he can best learn social and academic skills—while in others it may require, for example, separating an emotionally disturbed child from the regular class so he may be given special help.

Substantive Due Process

Claimed violations of Fifth and Fourteenth Amendment substantive due process are more likely to arise when a pupil or a group of pupils has been misclassified because incorrect or invalid criteria were used to determine abilities and thus which "track" should be followed in school. The alleged due-process violations most frequently focus on the use of IQ (intelligence) or aptitude tests, which, despite their status as being nominally objective and not dependent on irrelevant variables (such as teacher prejudice and social class), are nevertheless subject to telling criticism.[93] They are particularly open to criticism when test results are the primary basis for assigning a disproportionate number of

91. 94 S. Ct. 786 (1974).
92. 483 F.2d 791 (9th Cir. 1973).
93. Kirp, *supra* note 24, at 40, 43.

minority pupils—blacks or non-English-speaking—to special education programs designed for the educable or trainable mentally retarded.[94]

The basis for criticizing such tests is that they are used to determine the intelligence of children who are unfamiliar with either the language in which they are tested or the white, middle-class culture that underlies the test questions. In accepting the argument that these tests bear little relationship to the intelligence that they are supposed to measure if there is a language or cultural unfamiliarity, some courts have held that IQ tests may no longer continue to be used to place children in ability tracks.[95]

Moreover, the courts have also restrained school authorities from placing black students in classes for the educable mentally retarded on the basis of criteria that rely primarily on the results of IQ tests as those tests were then administered, if the consequence of using the tests is racial imbalance in the composition of such classes.[96] The courts similarly have ordered that pupils be tested in their primary language.[97]

Finally, the courts have ordered that other factors in addition to IQ, such as a pupil's socioeconomic background or social adaptation (or adaptive ability), also be considered in making the evaluation and as a guide for appropriate placement.[98] The use of an IQ test alone thus has been found to violate substantive due process since the basis for the school's action—the IQ score—is not reasonably related to the purpose for which it is used, namely ability-tracking and determination of what is a "suitable" or "appropriate" education.

Classifications pose several problems.[99] They tend to impose on a student the stigma of being retarded or different, causing him to be isolated from normal school experiences and to be rejected by students and adults alike. They suggest a stereotyped expectation of behavior, leading to self-fulfilling prophesy. Often, the label is permanent and cannot be escaped. The label limits the resources available to the child, since public and private agencies often serve only those persons labeled as being within their categorical clientele.

The classification may result in the child's being placed in a special educational program whether he needs it or not, or in being placed in an inappropriate special educational program. The classification often singles out racial minorities for assignment to special education programs. It does not ensure that the special education program in

94. Kirp, *supra* note 33, at 705, 757.

95. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

96. Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), and Diana v. State Bd. of Educ. C-70-37 R.F.P. (N.D. Cal. Jan. 7, 1970 and June 18, 1973).

97. Guadalupe Org. v. Tempe Elem. School Dist., Civ. No. 71-435 (D. Ariz. 1972).

98. LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

99. Kirp, *supra* note 24, at 40, and Kirp, *supra* note 33, at 705 set forth the major criticisms of classifications and develop a legal theory for attacking and reforming classification decisions.

which a child is placed will even be sufficiently effective for the child to overcome the disadvantages of being classified as retarded. Finally, assignment to a special education program becomes permanent, despite the intention to make it temporary.

In addition to the requirement that criteria be related to what they are supposed to measure—that is, the criteria cannot themselves be arbitrary—the standard for evaluation may not be arbitrarily applied. This means, for example, that when deciding which students from a group of white and minority students with similar abilities will go into "remedial" classes and which into classes for the educable mentally retarded, it is discriminatory to tend to put the white students in the remedial classes and the minority students into the classes for the retarded; such action demeans the minority student, attaching a stigma of inferiority.

Either more specific and valid criteria should be developed and explicitly stated, or all the students in the group should be placed in the same type of class. The remedy suggested by the courts to forestall the arbitrary application of a standard is compliance with the requirements of procedural due process—primarily, notification of the intended placement or of proposed changes in placement and increased opportunity for challenges to and hearings on placement (tracking) decisions.

Procedural Due Process

The procedures for implementing a judicially recognized right to education are crucial to ensuring effective educational opportunities. Typically, courts set forth detailed procedural requirements.

Notification. School authorities are first required to locate and notify all handicapped children and advise them of their rights to education. School records and census records are an obvious source. Local organizations, such as a local association for retarded citizens, may have census information on handicapped children. Court decisions have required the lists compiled by these methods to be submitted to the courts (or to a court-appointed master) at a specified time, and statutes require that the lists be given to the agency or department responsible for implementing the plans.

PARC ordered local school boards to conduct door-to-door canvasses and the Department of Public Education and other state agencies or departments giving services to children to search their records for names of handicapped school-aged persons. *Mills* required that a notice be published in three specified District of Columbia newspapers. The notice was to state that all children, regardless of handicap, have a right to publicly supported education suited to their needs and was to inform parents of procedures for enrolling children in appropriate educational programs. Spot announcements were also ordered to be made on local radio and television stations.

Evaluation and placement. After locating the handicapped children, school authorities are required to evaluate them and place them in

appropriate programs. Court decisions, consent decrees, or statutes lay out the procedural steps to be observed in placing a child, changing his placement, or excluding him from school. The first detailed set of requirements was in *PARC*, but under the terms of the consent decree issued in that case, these requirements applied only to the placement of mentally retarded children. *Mills* required basically the same procedure, but extended it to all handicapped children. Later cases have included the same procedural requirements, applicable to all handicapped children.

Two procedures generally are required to be followed. First, the child's parent or guardian must be notified in writing by registered mail; special provisions (not specified in the orders) are made for parents who cannot read. The notice describes the proposed action and the reasons for it (including any tests or reports on which the action is based) and alternative educational opportunities available to the child. Perhaps most importantly, the notice also informs the parent or guardian that he has a right to object to the proposed action at a hearing and that medical, psychological, and educational evaluations are available free of charge. [100]

Second, if the parent or guardian requests a hearing, it is required to be conducted by a hearing officer independent of the local school authorities at a time and place convenient to the parent or guardian. The hearing must be held between 20 and 45 days after school authorities receive the request for a hearing, though the 20-day minimum is waivable. It is to be closed unless the parent or guardian requests otherwise. [101]

The parent or guardian is to be informed that, at the hearing, he has a right to be represented by counsel, to present evidence and testimony, and to confront and cross-examine witnesses. In addition, he has a right to examine school records before the hearing and to be furnished with a transcript of the hearing if he wishes to appeal the decision of the hearing officer. A written statement that includes the decision, findings of fact, and conclusions of law is to be sent to the parent or guardian.

These requirements—that no child may be denied admission to a public school program or have his educational status changed without prior notice and an opportunity for a due-process hearing designed to ensure that school exclusionary or discriminatory practices are corrected by imposing on exclusionary or placement/classification decisions a rational procedure—tend to focus the decision on the child rather than on the system. [102]

The due-process requirements may indeed make such decisions more

100. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 879-81 (D.D.C. 1972).

101. LeBanks v. Spears, 60 F.R.D. 135, 142 (E.D. La. 1973); Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 881 (D.D.C. 1972). *Contra* PARC v. Commonwealth, 343 F. Supp. 279, 305 (E.D. Pa. 1972).

102. Kirp, *supra* note 24, at 40, 78.

rational; they may also provide educational opportunities to previously excluded or misplaced students; and they may provoke change by reason of the fact that they bring into the open the faults of the school systems.[103] They may promote more carefully considered educational placements; they may give rise to a wholesale reexamination of special educational programs; and they may be an effective tool to assure professional accountability.[104]

However, they may not strike to the heart of the reason for an exclusionary or discriminatory practice or classification; they require immense expenditures of time, money, and energy; and they may not produce more financial resources for special education, greater knowledge about how to make education for the handicapped more effective, or reform of the school organization and structure that inhibit equal educational opportunities for the handicapped.[105]

Periodic reevaluation. Another important procedural provision is that assignments must periodically be reevaluated. *PARC* required automatic biennial reevaluation of any educational assignment other than to regular class; annual reevaluation is available at the request of the child's parent or guardian. Prior to each reevaluation, there is to be full notice and opportunity for a due-process hearing.

Misuse of disciplinary procedures. Some procedures, such as disciplinary procedures, have been misused to exclude handicapped children from the public school. Court decisions have prohibited the application of these procedures in such a way as to exclude handicapped children from education. *Mills* directly addressed the problem of misused disciplinary procedures by setting out in detail the procedural safeguards to be used in any disciplinary proceeding.[106]

Mills states that the schools "shall not suspend a child from the public schools for disciplinary reasons for any period in excess of two days without affording him a hearing pursuant to the [due process] provision . . . and without providing for his education during the period of any such suspension."[107] The provisions for notice and hearing in disciplinary cases are much like those that apply to placement, transfer, or exclusion. The essential elements are notice to the parent or guardian of the action to be taken, the reasons for it, and the procedural rights of the parent or guardian, including the right to an evaluation and to examine the school records. In the notice and hearing provisions, the important difference between disciplinary cases and placement, transfer, or exclusion cases is that the hearing in disciplinary cases is automatic (that is, it need not be requested) and is to be held within four school days of the date that notice is given.

Classification criteria. A different type of concern for the procedures

103. *Id.* at 113-115.
104. *Id.*
105. *Id.*
106. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 882-83 (D.D.C. 1972).
107. *Id.*

used in placing children within the school system is shown in the cases challenging (on substantive due-process grounds) the use of IQ tests, because of their linguistic and cultural bias, for purposes of determining intelligence and student tracking.[108] At issue is the validity of the criteria used in the evaluation and placement. The courts generally have enjoined the continued use of IQ tests as they had been previously used.[109] Some courts have ordered the development of an intelligence test that is validated or free of cultural (white, middle-class) bias.[110]

Courts have also required that factors in addition to IQ tests be heavily weighed in evaluations. Although a number of plaintiffs have argued that a child's "general background" is relevant to determining his intelligence, the most specific suggestion of additional factors to be considered is set out in *LeBanks v. Spears*.[111] The *LeBanks* consent decree judicially established new standards for defining mental retardation; no child can be found to be mentally retarded unless

> 1. he has an IQ of 69 or below on an individually administered test
>
> 2. he is also substantially below normal in adaptive behavior
>
> 3. he is still rated well below normal on both measures after the effects of sociocultural background are taken into account.[112]

Similar criteria are specified by legislation in California.[113]

Other restrictions on the use of IQ tests are the requirements that the tests be administered in the child's primary language (usually individually) and that the ability distribution based on the tests not be racially imbalanced.[114] If a minority group represents a higher proportion of the students classified as mentally retarded than of the school population as a whole, retesting or reevaluation may be required.[115]

Expunction or correction of records. *Mills* provides for the expunction from or correction of any records of any plaintiffs with regard to past expulsions, suspensions, or exclusions, through either academic classifications or disciplinary actions, that violated the procedural rights of the plaintiffs. When a child has been placed incorrectly in a

108. Kirp, *supra* note 33, at 705.

109. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

110. Diana v. State Bd. of Educ., C-70-37 R.F.P. (N.D. Cal. Jan. 7, 1970 and June 18, 1973).

111. LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

112. *Id.* at 141.

113. CAL. EDUC. CODE § 6902.085.

114. Guadalupe Org. v. Tempe Elem. School Dist., Civ. No. 71-435 (D. Ariz. 1972); Larry P. v. Riles, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972).

115. Larry P. v. Riles, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972).

program for the mentally retarded, his records must be corrected.[116]

Dominant School Practices

Exclusion

In considering the right to education of handicapped children, the two major issues to which legal principles are applied are exclusion and classification. Exclusion occurs when children have been denied education as a result of either being totally excluded (by being denied access to all public educational programs) or being provided with an inadequate education for their needs. Total exclusion may involve the school's simply refusing a child or placing him on a long waiting list. their needs—when, for example, Spanish-speaking children are given a regular English-taught curriculum and no special provision is made for the fact that they do not understand English, or when moderately retarded children are put in large classes and given little or no training or education. Such a practice ("functional exclusion") results in an exclusion from education because, though the child has access to a program, the program is of such a nature that he cannot substantially benefit from it and therefore receives none of the intended benefits of education.[117]

Two views of education seem to underlie the findings that these types of exclusions are impermissible. The first view is usually buttressed by a quotation from or reference to *Brown* to demonstrate the importance of education in preparing a child to function adequately in society. In *Brown*, the Court referred to education as familiarizing children with the values and habits of the dominant cultural and political group; the Court viewed the purpose of education as teaching people to function in a middle-class society.[118] When recent right-to-education decisions quote *Brown* on this point, they seem to assert that every child needs training to develop his capacities so that he can function to the best of his ability in society.

The second view supports the importance of education for developmentally disabled children. The courts cite with approval expert testimony that all children, no matter how disabled, can benefit from education and training.[119] The right of these children to education then assumes a significance that justifies judicial enforcement of the right. Without such testimony to establish that a handicapped child can benefit from education, his "right" to education would be a

116. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 880 (D.D.C. 1972).

117. *See, e.g.*, Lau v. Nichols, 94 S. Ct. 786 (1974); Serna v. Portales, 351 F. Supp. 1279, 1282 (D.N.M. 1972), and cases cited *infra* at note 111 on issue of "functional exclusion."

118. 347 U.S. 483, 493 (1954).

119. *See, e.g.*, PARC v. Commonwealth, 343 F. Supp. 279, 285, 307 (E.D. Pa. 1972), and Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

burden on the state with no compensating benefit to anyone. In such a case the courts might find that the state has a "compelling" or "legitimate" interest that would justify excluding the child from education.

This argument introduces the corollary that the child is entitled to receive an "appropriate" educational program—that is, a program suited to his needs—and that what the child in fact receives is worthy of being called an education only if he can *benefit* from it. The fact that a child can benefit from "appropriate" education but not from inappropriate education is a major factor in the courts' use of equal-protection arguments to find that children in unsuitable programs are denied equal rights to education because they are incapable of and are not in fact benefiting from the education. [120] In effect, the courts hold that education from which a child cannot benefit is no education at all.

Classification

The second major issue is the classification of school-aged children. [121] Classification problems arise when it can be argued that children have been misplaced or wrongly tracked within the school system and in some cases when they are not admitted to the public schools at all. [122] Classification issues are addressed primarily by the substantive and procedural due-process arguments. Substantive due process challenges the criteria on which the classification is made and how these criteria are applied; procedural due process affords a basis for reviewing the resulting placement and reevaluating the pupil.

In one sense, the major challenges to school placement criteria have been veiled accusations of racial discrimination as much as complaints of denial of education. The complainants who have attacked the use of IQ tests as the main criterion for tracking and for determining whether a child is mentally retarded have claimed that the tests are biased toward familiarity with the English language or with white middle-class culture. The courts have responded by enjoining the further use of IQ tests for evaluations [123] or by requiring that other factors be used in addition to the IQ scores to compensate for the sociocultural bias of the tests. [124]

The courts have emphasized the bad effect that placement in a lower track or in a class for the mentally retarded has on children of minority groups (the usual plaintiffs in such cases). [125] They have recognized

120. *See, e.g.*, Lau v. Nichols, 94 S. Ct. 786 (1974); Guadalupe Org. v. Tempe Elem. School Dist. No. 3, Civ. No. 71-435 (D. Ariz. 1972); and Serna v. Portales, 351 F. Supp. 1279 (D.N.M. 1972).

121. *Supra* note 99.

122. *Id.*

123. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), and Larry P. v. Riles, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972).

124. LeBanks v. Spears, 60 F.R.D. 135, 141 (E.D. La. 1973).

125. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); and Larry P. v. Riles, 343 F. Supp. 1306, 1309-10, 1311, 1315 (N.D. Cal. 1972).

that the segregation and labeling of students that occur as the result of a low placement stigmatize the child as being inferior and lead to decreased expectations by himself and by others for him with respect to his future achievements, and eventually to decreased efforts to teach him. The result is particularly invidious for children in minority groups, who already have lower expectations and less encouragement. Labeling a child can have a negative and unwarranted effect whether or not he is a member of a minority group; all classifications that attach to a child a label that might have stigmatizing effects are required to be subject to procedural safeguards, proofs, and challenges. [126]

Recent Changes in the Law

Sources of the Change

The emerging law is the result of court decisions and consent decrees (requiring enforcement of existing constitutional and statutory provisions and ordering procedural due-process requirements) and state legislation (frequently enacted in response to litigation or because of an increasing awareness of problems in this area). The legislation is not a result of beneficence or altruism on the part of the legislatures.

An important part of the change in the law of education for the handicapped has been the enforcement of existing laws. The generally phrased state constitutional or statutory guarantees of a right to education for all children and the specific guarantees of a right to education for handicapped children are being heeded. The policy inherent in mandatory attendance laws is being recognized and, often under court order, enforced. The exceptions to the compulsory attendance laws that formerly made them in effect compulsory exclusion laws for handicapped children are being eliminated—at least to the extent that an alternative form of education is being required if regular classroom education is not appropriate or feasible. Finally, courts and state legislatures and agencies are requiring that statutes authorizing special educational programs and facilities be implemented; the authorization is being transformed into action.

Changing Law

Most of the specific procedural and substantive changes in the law have taken the form of implementation of a "zero-reject policy" recently established in many states. This policy is that all children have a right to publicly supported education. Statutes provide, for example, that "the policy of the State is to ensure every child a fair and full opportunity to reach his full potential and that no child . . . shall be excluded from service or education for any reason whatsoever." [127]

126. Larry P. v. Riles, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972), and LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

127. General Assembly of North Carolina, ch. 1293, 1973 Sess. (2d Session, 1974).

Cases have required that no handicapped children be excluded from education.[128] The zero-reject policy sometimes is couched in terms of the right to education for all children and sometimes for all exceptional or handicapped children or for a specific group of handicapped children, but the direction in all instances is toward excluding no one from public education.

When all children are to be furnished with a public education, the purpose of education must be redefined because many developmentally disabled children would not be able to master even a modified regular academic program. The purpose of education thus becomes the development of the child's capacities to the highest level of achievement of which he is capable.[129] An important background to the establishment of a zero-reject policy has been the legislative or judicial recognition that all children can benefit from some form of education or training and that even the most disabled children can achieve a degree of self-sufficiency.[130]

The requirement in *Mills* and *PARC* that all school-aged children be given publicly supported education arguably includes children in institutions.[131] These children would not receive regular public schooling, but rather another appropriate type of training. Indeed, some recent right-to-treatment cases have more directly asserted that there is a right to education for institutionalized persons. The leading case is *Wyatt v. Stickney*, which expressly found a right to "habilitation":

> Residents shall have a right to receive suitable educational services regardless of chronological age, degree of retardation, or accompanying disabilities or handicaps . . . School age residents shall be provided with a full and suitable educational program and such program shall meet prescribed *minimal* standards.[132]

128. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1971); PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972); Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974); and Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971).

129. The court's memorandum in *Maryland Ass'n for Retarded Children v. Maryland* defines education as "any plan or structured program administered by competent persons that is designed to help individuals achieve their full potential." Cir. Ct., Baltimore Cty., Equity No. 100/182/77676 (May 3, 1974).

130. The amended consent decree in *PARC v. Commonwealth* noted: "[E]xpert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; . . . that a mentally retarded person will benefit at any point in his life and development from a program of education and training." 343 F. Supp. 279, 307 (E.D. Pa. 1972).

131. *See, e.g.*, PARC v. Commonwealth, 334 F. Supp. 1257 (E.D Pa. 1971) and 343 F. Supp. 279, 312 (E.D. Pa. 1972), and Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore County, filed May 3, 1974).

132. 344 F. Supp. 387, 396 (N.D. Ala. 1972), *appeal filed sub nom.* Wyatt v. Anderholt, No. 72-2634 (5th Cir. Aug. 1, 1972, argument heard December 6, 1972). There is no decision yet from the court of appeals.

While some cases[133] have followed *Wyatt*, other cases have held that there is no right of habilitation. The court in *New York Association for Retarded Children and Parsi v. Rockefeller*[134] found that many of the living conditions at Willowbrook State School for the Mentally Retarded were below the "basic standards of human decency," but declined to hold that residents have a federal constitutionally based right to habilitation. The case most strongly in contrast with *Wyatt* is *Burnham v. Department of Public Health of State of Georgia.*[135] The court dismissed the action, which was based on an asserted federal constitutional right to treatment (which, the plaintiffs argued, included education), finding no legal precedent for a declaration that such a right exists.

When a right to education for developmentally disabled children is established, it is not sufficient that the child have access to simply any type of education; the education is required to be "suited to [the child's] needs"[136] or "appropriate to his learning capacities."[137] For example, the 1971 Michigan statute mandating education for all handicapped children provides for "the delivery of special education programs and services designed to develop the maximum potential of every handicapped person."[138] However, neither courts nor legislatures have attempted to determine what constitutes "suitable" or "appropriate" education.

The closest they have come to deciding what is suitable education is to discuss the special educational opportunities that should be made available by school authorities to handicapped persons who have been disadvantaged in some way. *Mills* required compensatory education for members of the plaintiff class in order to overcome the effects of prior educational deprivations.[139] *LeBanks* required that education be made available to all mentally retarded adults in Orleans Parish who had been denied education as children.[140] Similarly, although "early intervention" (that is, preschool training) for developmentally disabled children has not generally been ordered by the courts, legislatures often find as a matter of state policy that early education is desirable.[141]

A zero-reject policy does not necessarily require that all children be

133. *See, e.g.*, Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974).

134. N.Y.A.R.C. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

135. 349 F. Supp. 1335 (N.D. Ga. 1972), consolidated on appeal with *Wyatt, supra* note 132, No. 72-3110 (5th Cir. Oct. 5, 1972).

136. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 878 (D.D.C. 1972).

137. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 307 (E.D. Pa. 1972), and Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

138. MICH. STATS. ANN. §15.3242(2).

139. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 879 (D.D.C. 1972).

140. LeBanks v. Spears, 60 F.R.D. 135, 140 (E.D. La. 1973).

141. *E.g.*, General Assembly of North Carolina, ch. 1293, 1973 S.L., 2d Sess.

placed in regular classrooms within the public school system. "Suitable education" may take an alternative form, such as homebound instruction for physically handicapped children unable to attend school. A child who would not benefit from a program of instruction within the public school system might be assigned to the state department that oversees the state institutions, but the child nevertheless is entitled to an appropriate program of education and training.[142] In some instances, homebound or in-hospital instruction is permissible only if the pupil is physically unable to attend school.[143] Finally, a Maryland case requires that transportation to alternative forms of education be provided by the state.[144]

Another alternative to classroom instruction within the public schools is a program of tuition and maintenance subsidies for children whose special needs cannot be met by the public school system. Many states have provisions for tuition subsidies, which are granted on the condition that the school or institution attended by the child provide education and training and not merely perform a caretaking service.[145] *Mills*, *PARC*, and a Maryland case all order that tuition grants be made available when suitable education is not available within the public schools but can be obtained in a private school or institution.[146] These cases also note, however, that a state does not discharge its duty to provide education by referring a child to a private facility where he will be placed on a waiting list.[147]

Clearly, then, alternatives to regular classroom education—such as tuition grants, homebound instruction, and separate special classes—are recognized as sometimes being the most appropriate form of education for a child. Some courts, however, have stated that regular classroom instruction (with auxiliary services if necessary) is preferable to separate special classes, which in turn are preferable to homebound instruction.[148] This preference for placement in a learning situation that is as near as possible to normal is based on the belief

142. Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

143. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 287 (E.D. Pa. 1972). A diagram showing the order in which possible programs of instruction are preferred is the "Cascade System," from M. Reynolds, "A Framework for Considering Some Issues in Special Education," 28 EXCEPTIONAL CHILDREN, 367 (1962).

144. Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

145. *Supra* note 14.

146. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 302 (E.D. Pa. 1972); Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 878 (D.D.C. 1971); and Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

147. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 302 (E.D. Pa. 1972); Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 878 (D.D.C. 1971); and Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

148. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 311 (E.D. Pa. 1972), and LeBanks v. Spears, 60 F.R.D. 135, 140 (E.D. La. 1973).

that children with special problems benefit from contact with "normal" children and on a desire to avoid the stigma of difference that attaches to children who are separated from the regular program.

Financial Impacts And Considerations

Educating a developmentally disabled child inevitably costs more than educating a normal child.[149] Special education programs often require more teachers and other personnel (for example psychologists, physical therapists, occupational and speech therapists, and teachers' aides) than programs for normal pupils. They also often require special (and usually expensive) equipment and facilities that are not usually needed for programs for normal pupils. Moreover, the cost of educating a developmentally disabled person increases with his disability and as the education furnished him becomes more "appropriate" to him.

It is largely because of higher cost that school authorities have neglected the education of the pupil with special needs. Funds for special education are short, perhaps because educators have not been willing or able to plead successfully for funds for special education, or because the governmental units that appropriate funds for operating the local schools have been unmindful of the needs of special education. But whatever the reason, the lack of money is quite beside the point and is an inadequate defense to litigation brought to ensure the right of the handicapped to education.

The Circuit Court for Baltimore County, in its indictment of the inadequacies of special education in Maryland, stated that the "chief reason why the State's responsibility to the mentally retarded had not been properly discharged is inadequate funding."[150] The court's charge not only exposes the low regard in which special education has been held but also provides the cue to the court's prescribed remedy—an order that the state provide the necessary funding:

> No public goal, however lofty and however clearly set forth by the General Assembly, can be reached unless the State, particularly the executive budget authorities, provides adequate funding. The main thrust of the decree will be to place joint responsibility on the Mental Retardation Administration and the State Department of Education for the education of the mentally retarded, and to declare that the State of Maryland has the obligation to provide the necessary funding.[151]

It is, moreover, incumbent on school and budget authorities to at least make equitable expenditures of whatever funds might be available:

> Similarly the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be

149. Surprisingly, none of the right-to-education cases make this finding.

150. Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

151. *Id.*

> expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[152]

Recent court orders and new statutes have called for the expansion of existing programs and the addition of new ones, as well as the operation of miscellaneous programs supporting the special education classes, all of which mean even further expense for the education of developmentally disabled children. There will be not only the obvious costs of teachers, facilities, and supplies but also costs for tuition and maintenance-grant programs; for transportation where necessary; for the frequent psychological evaluations and due-process hearings called for by the new procedural requirements; and for the identification, evaluation, and proper placement of handicapped children. The burden of any one of these will be substantial. For example, Pennsylvania officials have estimated the cost of each hearing held under the *PARC* decree to be $500, or about half the amount spent on the education of a typical Pennsylvania child each year.[153] And there are many other school programs competing for fiscal priority.

But a number of commentators have emphasized that however great the cost of providing suitable education, it is less than the costs of the institutionalization or unproductivity of the handicapped that result when education is not provided. It is estimated that three-fourths of the largest group of developmentally disabled persons—the mentally retarded—could be fully self-supporting given proper education and training and that another 10 to 15 percent could be partially self-supporting.[154]

In 1967, the country spent $500-$600 million to institutionalize 200,000 mentally retarded persons; this does not include the cost for the mentally retarded placed in private institutions or in institutions for the mentally ill.[155] The cost of institutionalizing a single person for his life at Pennhurst, an institution in Pennsylvania, is one-half to three-quarters of a million dollars.[156] The social and financial costs of the unproductivity of these people is a less obvious but still significant public burden. Courts and legislators should find some comfort in the fact that money spent on special education is not a wasted or frivolous use of public funds.

Given the complexity of the financial aspects of complying with court-ordered education for the handicapped, it is not surprising that the courts have left to the public officials charged with implementing

152. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 876 (D.C.C. 1971).

153. Kirp, *supra* note 24, at 40, 81.

154. PCMR, *supra* note 29.

155. Comment, *supra* note 13.

156. Pennsylvania Public Television Network program of June 30, 1974, "Child of the Universe."

their decisions the responsibility to plan for and secure financing to carry out the court orders. Nor is it surprising that the administrative and legislative responses to the problems of financing the newly ordered education for the handicapped may have to take into account not only the amount of funding necessary but also the pattern of funding. The decision will have to be made whether the state will assume all costs or only part of them. Related questions are as follows: What cost-sharing arrangements will be necessary or desirable among state and local units? What criteria for financial aid to local units are to be adopted? What tax base is to be relied on for financing the new costs? To what extent can private-sector services be purchased by the state or local units? In addition, decision-makers must take into account the costs of producing the required number of new professionals for the schools and universities. And finally, because of the absolute limitation on available funds, budgets for "normal" programs may have to be adjusted in order to provide for "special" programs.

None of these matters should initially be the province of the courts. Yet it seems entirely possible that any of them will become the concern of the courts, since the failure of school authorities to provide equal educational opportunities for the handicapped could well center on any one, or a combination, of these matters. The strong language in *MARC* ("the State of Maryland has the obligation to provide the necessary funding") and the equal-protection approach of *Mills* (that the inadequacies of funding cannot be allowed to bear more heavily on the handicapped child) together with the demonstrated resistance of some school authorities to comply[157] indicate that the courts will have to make a detailed inquiry into the financing of special education.

Implications And Implementation

There can be little doubt that the right-to-education cases will have a profound impact on normal and special education programs, on school authorities, and on other state authorities charged with the care and treatment of handicapped children. And, as the previous section made clear, the cases have great implications for the resources from which those programs and authorities draw—particularly the private-sector providers, the legislative appropriators of funds, and the university-based educators and trainers of special educators. The exact dimensions of the impact cannot yet be measured though they can be discerned.

Identification, Evaluation and Placement

The first responsibility of the school authorities is to identify, evaluate, and appropriately place handicapped children. Identifying the special children is by no means an easy task; it requires an expendi-

157. Kirp, *supra* note 24, at 40, 90.

ture of time, money, and effort on a grand scale and strong backing by "consumers"—those who receive educational services, their parents, and their lay and legal advocates.[158] Frequently, state and local school authorities will be unwilling to put forth the effort required to make a successful identification.[159]

Evaluation is an altogether different matter, one that calls into question not the expenditures or cooperativeness of school and other public officials, but rather the cautious use of test information and the correct administration of tests. School classification by testing[160] has been criticized because classifications are too rigid, they serve almost no educational purpose, they result in misclassifications, they are racially discriminatory in motive or effect or both, they have an adverse effect on school success, they stigmatize, and they result in self-fulfilling and self-limited prophesies.

As stringent as these criticisms are, they do not suggest, however, that testing and classification should be abandoned altogether. Tests can prove useful if they are properly conceived (culture-free), properly administered (individually), and properly used (for classification). The trouble has been that the schools have not properly conceived, administered, or used testing devices; as a result, evaluations have been improper, and misclassifications have resulted.[161]

Placement in an appropriate educational program is the end product of identification and evaluation. Yet it is by no means settled what is appropriate for particular types of handicapped children.[162] Educational policies—for example, the view that mainstreaming is preferable to self-contained, segregated classrooms and programs—sometimes find their way into judicial decrees.[163] Judicial endorsement of such policies may tend to freeze the innovativeness and curtail the flexibility needed to provide more individualized instruction that takes into account the child's handicapped condition:

> Abandoning all sorting, pretending that everyone is really alike, provides no solution to these problems [of classification for purposes of providing appropriate education]. The task is to identify less category-bound, more flexible means of handling the particular difficulties of individual children; and that, in turn, may involve major changes in instructional approach for all students.[164]

A decision on whether to mainstream should depend in part on the child's age and disability; in part on what other programs are available in the school system or outside it; in part on the availability of skilled resources—teachers and resource teachers—in the school program and outside it. A generalized solution—such as a preference for main-

158. *Id.* at 81, 95-6.
159. *Id.* at 95-6.
160. Kirp, *supra* note 33, at 705, 717-720.
161. *Id.* at 754-759.
162. Kirp, *supra* note 24, at 40, 92.
163. LeBanks v. Spears, 60 F.R.D. 135, 140 (E.D. La. 1973).
164. Kirp, *The Great Sorting Machine*, PHI DELTA KAPPAN 521, 524 (April 1974).

streaming—may help in guiding the way to reforming special and normal education, but it may be detrimental to some students.

Change in Priorities and Organization

The thrust of the court orders is to establish a zero-reject policy for the schools, a requirement that no school-aged handicapped child be excluded from an appropriate educational program. The operative term is "no child." Yet, traditionally, the schools have excluded numerous children—particularly the profoundly and severely retarded, the multiply handicapped, the retarded or emotionally disturbed child who is also disruptive, and others. Now, they are being ordered not only to cease excluding such children but also to act affirmatively to provide them with an appropriate, meaningful, child-centered education.

Compliance with these orders will require a reordering of the priorities of the schools, a reordering that first shifts the emphasis in education from education for only the normal child to meaningful education opportunities for all children and then redefines the very concept of education so that education is not only academic but also embodies social and self-help training.

Moreover, a vast reorganization of the educational infrastructure is likely to follow—as a matter of logic, common sense, and good will—as a result of compliance with the letter and the spirit of the new court orders. Not only will vast fiscal problems possibly require a change in the level and pattern of financing public education, but also the organization of educational services will undergo a substantial alteration. The presently limited capacity of school systems to comply with the zero-reject ideology will have to be expanded. Some of the changes that must take place are as follows:

New personnel will have to be better trained.

The number of special educators and resource teachers will have to increase geometrically.

The nature of their training will have to be modified so that they can effectively deal with both the educable mentally retarded and more severely handicapped students.

The university-based resources—special education departments and outreach institutes—will have to shift their focus from training teachers of the EMRs to training teachers of the TMRs and profoundly and severely retarded children.

Finally, funding sources—federal and state agencies and legislatures—will be required to pay more attention to the development of programs and personnel for the previously low-priority or neglected types of handicapped persons.

The "lost child" and "service gap" syndromes will have to be eliminated. No longer will it be permissible or even possible for various state or local agencies to pass the buck on the respective responsibilities for educating or training a handicapped child. Children who do not fit into one category of handicap will not be allowed to be without services simply because categorically defined and oriented services are not available to them. The various affected state and local agencies—education, institutions, human resources, corrections, mental health, mental retardation—will be required to cooperate and coordinate toward the end that an appropriate educational program is made available for each handicapped child.

Compliance with the new court-ordered mandates will surely affect other programs within the school systems. Which programs will be affected and how require an early determination. Moreover, compliance will just as surely affect the relationship of publicly provided services to privately provided services. Cooperative arrangements (such as sharing costs, personnel, and facilities) between the public and private sectors will be necessitated.

While it will be no easy matter, the stigmatizing effect of classifying a person as handicapped in order to provide him with appropriate services needs to be ameliorated. A stigma is created because of cultural and normative perceptions; we attribute inferiority to a person as a result of our value systems, not because of the innate or inherent inferiority of the person. A change of attitude by educators to begin with and then by their normal pupils and the general public is essential to providing equal educational and life opportunities to handicapped children.

If compensatory education and education beyond the customary school age is indicated, a reorganization of educational services is inevitable.

Finally, if the schools are to contribute to overcoming the socioeconomic causes of retardation—that is, if they are to play an effective role in preventing the condition they are now required to deal with after it has arisen—they will likewise have to redefine their responsibilities and their capacities for fulfilling those responsibilities, emphasizing early intervention to a greater extent than they do now.

Due-Process Hearings

It is not remarkable that the concerns of lawyers and courts have focused in large part on the requirement of procedural due process, for they are more likely than other professionals to believe that a fair procedure will produce results by which they are willing to abide. Indeed, due process molds the substance: the requirement that a hearing be held before a child can be placed in special education programs or transferred within them or excluded from them or excluded from school tends to force the educational process to fit the child's needs.

The fact that educational decisions henceforth will have to be child-centered represents a marked departure from the past, when educa-

tional decisions were more likely to require the child to fit the system. In addition, the due-process requirements are likely to require educators to weigh the advisability of a particular placement more carefully. They also have the potential for triggering a wholesale review of special and normal educational programs. Finally, they serve to hold educators accountable to the child for a host of decisions—initially for his placement and ultimately for the quality of the educational offerings available to him.

Yet all is not well with the due-process emphasis, and there remain many unresolved issues, such as the following:

> whether hearing officers should be independent of the school system directly affected by a hearing result
>
> whether they are required to report their decisions
>
> whether a central state agency will make the reported decisions available to school systems and consumers on a statewide basis
>
> what appeal procedures are appropriate, (for example, to whom an appeal should lie; whether transcripts should be made and be available to appealing parties; whether the costs of the proceedings—transcripts, counsel, independent psychological testimony, or educational evaluations—should be borne by the state or the local school unit)
>
> whether hearing officers have any equitable powers (for example, to order the school unit to provide transportation to a handicapped person or to provide in-home instruction).

In addition, there remain not only unanswered questions but also unsolved problems.[165] Hearing officers are frequently inadequately trained to perform their work. Extraordinary expenditures of time, money, and energy are required to provide hearings. Hearing officers have other responsibilities. Cases are backlogged. The presence of attorneys representing the affected child, though likely to produce a result more favorable to the child, injects an unwelcome note of adversariness into the hearings, potentially thwarting the processes of negotiation and accommodation that the hearings might promote. Hearing officers lack a clear understanding of their responsibilities and powers. They have no clear procedural standards or guidelines to follow (unlike other quasi-judicial, administrative hearing officers).

There is no present method for assuring uniformity of decisions or even the reporting of decisions (a method that might promote uniformity). No criteria have been set on such important matters as the burden of proof (who carries it and what amount of proof is required) and what evidence is to be considered. The mere fact that hearings are

165. Kirp, *supra* note 24, at 78-81, 90-96.

available tends to be a double-edged political sword for intimidation of the "adversary"; it also tends to discourage some educators from making special education placements (a desirable result if the placement is likely to be inappropriate, but an undesirable one if it is likely to be appropriate).

Finally, compliance with due-process requirements does not necessarily assure an appropriate placement. Hearing officers have not tried to seek out the most appropriate placement, and they, along with other educators and consumers, have no greater knowledge (or ability to reach a consensus with their educator-colleagues) about what is appropriate than they had before the due-process requirements were instituted.

Conclusion

What the best-intentioned educators, legislators, and advocates for handicapped children have tried with mixed success for many years to accomplish—appropriate and effective education or training for all handicapped school-aged persons—is unlikely to be achieved solely by the increasing involvement of the courts in the educational process. Moreover, even if judicial involvement tends to help achieve the goal, it probably will not be able to do so in a short period of time. The obstacles are too great: limited financial and professional resources; competing demands for those resources; organizational impediments to reform; ideological obstinacy (education is different from training in self-help skills); and public and private attitudes about the worth of the handicapped person.

Yet judicial involvement is welcome. It already has questioned many time-honored but false beliefs and practices of educational systems. These practices have erected sometimes insurmountable barriers to access to public education by the handicapped. Such practices have instituted deleterious tracking systems: once a person is classified as incompetent (because of retardation) in one respect, he is deemed incompetent in all respects and therefore unable to benefit from education or training. And they have reflected the prevailing belief that public goods and benefits should be allocated according to a person's merit, which is correlated with intelligence (the more intelligent the student, the more educational benefits he receives).

The prospect for both questioning and changing these beliefs is, in the long term, not bad. Courts have demonstrated that they can make substantial changes in education in other areas—segregation, teacher rights, students rights, and financing—and it is not to be seriously doubted that they can effect some change in the area of special education. The principal limits on their abilities, however, are external to the courts and beyond the reach of the law. This fact suggests that court-initiated change is likely to be more incremental, marginal, hortatory, and reactionary than legal and educational reformers might hope.

APPENDIX

Proposed Statutory Provisions: Special Education Law

Undoubtedly spurred on by recent right-to-education litigation, many legislatures have been giving close attention to their state's constitutional foundations for education, their statutory provisions for special education, their pattern and level of financing of special education, their administrative organization for providing it, and the adequacy and appropriateness of their special education programs. Likewise, many states recently have enacted right-to-education laws providing for education of exceptional children.

These laws have been enacted either as part of legislation providing education for all students, or as separate and discrete legislation. Some states perhaps will find that existing legislation has been or will prove to be inadequate to respond to the judicially established right-to-education mandates. Other states, having failed to pass right-to-education legislation or having passed it only to find that it is insufficient to meet the needs of exceptional children, will have occasion to review their legislation. And all states will face the recurring problems of financing special education programs, providing a sufficient number of well-trained special educators, and organizing effective and efficient special education delivery systems.

In light of these considerations, the Council for Exceptional Children, Reston, Virginia, has published two Model Statutes setting forth some of the legislative responses that ought to be forthcoming to right-to-education demands. In addition, the National Special Education Information Center, Washington, D.C., and the Education Commission of the States, Denver, Colorado, both publish reports of legislative developments at the state level. Part of what is set forth below, in the form of proposals for legislative action, borrows from those materials.

The extent to which any model statutes or proposals are considered by state legislatures will depend on at least several variables, particularly the state's present legislation, its organization for providing special education, its pattern of financing of special education, and requirements of federal legislation (*see, for example,* P.L. 93-380, Education Amendments of 1974).

Part I: State Policy and Action

A. Declaration of Policy and Principle. The legislature should recite the state's policy and principle of educating and training all exceptional children in free public programs ("special education programs") sufficient to meet and suited to their needs and appropriate to their individual characteristics, to the end that their maximum

capabilities may be developed in the least restrictive educational or other setting.

The legislature also should set forth its findings that all exceptional children are capable of benefiting from appropriate programs of education and training.

Finally, it should define "education" and "training" to mean any structured program or plan designed to help individuals achieve their full potential or develop their maximum capabilities.

B. Definition of Exceptiona' Child. The term "exceptional child" ("child with special needs" or "handicapped child") should be defined in the most inclusive manner. It should include, without limitation, all children who because of mental, physical, or emotional handicaps need special education and training or are unsuited for enrollment in a regular class of the public school programs or are unable to be adequately educated in the public schools. Among those included in the definition should be children who are mentally retarded (all degrees of retardation), neurologically impaired, epileptic, learning disabled, cerebral palsied, emotionally disturbed, hyperactive, physically handicapped or crippled, autistic, multiply handicapped, homebound, pregnant, deaf or hearing-impaired, language or speech-impaired, blind or sight-impaired, abused, neglected, socially maladjusted, or suffering from behavioral problems or aphasia. The definition also might include those who are gifted or talented.

C. Age Inclusiveness. The legislature should set forth the ages of the exceptional children to be served (for example, birth to 21, 3 to 18, and so forth).

It also should take note of the fact that some exceptional children have been denied appropriate education and are entitled to compensatory education; the age limit for receiving such compensatory education should be specified, or the amount of such education (absent an upper-age limit) should be set by formula.

Statewide early diagnosis, screening, and intervention programs should be required, to the end that the target population can be determined in conjunction with census and registration programs (§ I-D).

D. Services Made Mandatory; State and Local Plans; Census and Registration. The legislature should direct that education be provided to exceptional children by the appropriate state and local agencies, and should identify those agencies by name and function (for example, state departments of education or public instruction, corrections, social services, human resources, institutions, local boards, technical institutes, mental health and mental retardation centers or clinics, and juvenile services bureaus). The legislature should require these departments to submit to it and the single state agency (§ III-A), on an annual or other periodic basis, their plans for coordinated and cooperative programs designed to fulfill their responsibility of providing appropriate special education to all exceptional children within their respective jurisdictions. The plans should contain a detailed timetable for accomplishing that goal and a description of the kind and number

of facilities, personnel, and services available and necessary (but unavailable) to meet the goal. If statewide special education programs are not already being provided to all exceptional children, the legislature should set forth the dates for submission and implementation of state and local agency plans for accomplishing that goal.

It also should provide for an annual or other periodic statewide census and registration of exceptional children and set forth the census-taking responsibilities.

E. Preference for Mainstream. The legislature should declare a preference (but nothing more) for regular instead of special education in the public schools, and for special education in the public schools instead of similar education in other settings (such as at home or in correctional institutions or mental retardation facilities). It also should repeat its mandate that exceptional children be educated in the least restrictive setting (§ I-A).

Part II: Educating Exceptional Children

A. Compulsory Education; Inclusion of All Exceptional Children; Repeal of Exclusionary Laws. The legislature should compel the attendance of all exceptional children in appropriate special educational programs during the age-specified period (§ I-C). Any existing legislation that conflicts with the compulsory education requirement or permits schools or other service-providers to exclude exceptional children on account of their exceptionalities should be repealed, not by a general repealer but by specific reference.

B. Abolition of Waiting Lists and Discriminatory Admission Standards; Disciplinary Suspensions. The legislature should prohibit the creation and use of any waiting lists or quotas for entry into special education programs; it should require service-providers to make those programs available to all who are eligible for or need them; it also should prohibit eligible children from being excluded on account of the providers' lack of capacities to serve unless other adequate alternative services can be provided elsewhere.

The legislature should prohibit the use of discriminatory criteria for admission of exceptional children to the public schools or other educational programs. Such criteria have included the requirement that the pupil be able to substantially profit from an appropriate program of education, that he be ambulatory, or that he be toilet-trained. Since no such criteria are applied to pupils in normal educational programs, they should be prohibited with respect to exceptional children.

If an exceptional child poses a behavioral or disciplinary problem that is sufficient cause to suspend him from his special education program in the schools or in school-type settings, the legislature should require that the suspending authority continue to provide special education in nonschool settings during the period of suspension.

C. Diagnosis and Evaluation. A medical, psychological, developmental, and intelligence evaluation of every child thought to be excep-

tional should be required. Tests should be individually administered in the child's primary language by a certified school or other psychologist. They should be culturally validated if the child is not from the cultural and socioeconomic environment from which test questions are drawn. They should be appropriate to the child's present capabilities (for example, a nonverbal child should be given a nonverbal intelligence examination, not a verbal one). Evaluations should be based on IQ and the adaptation quotient of the American Association on Mental Deficiency.

Periodic reevaluation should be required (at least once every two years) and, in addition, reevaluation should be made available (not more than once a year) on the request of the parents or other adults responsible for the child ("parents"). The evaluation results should be furnished in writing to the parents, and an interpretive conference between the persons making the evaluation and the parents should be made available at the parents' request.

Upon a showing of good cause, the parents should be entitled to have an independent evaluation made; that evaluation should be made at state expense if the parents are indigent.

D. Classification and Placement. The assignment of an exceptional child to a program should be based solely on the diagnosis and evaluation (§ II-C) and on the availability of appropriate services. A review of the placement should be required after each diagnosis and evaluation (§ II-D).

E. Procedural Due Process. Whenever any decision on classification, placement, or evaluation is made and any change in a child's educational status is recommended or planned (for example, change of status from normal to special education, from one type of special education to another type, from inclusion in a public school setting to exclusion from it and placement in a nonschool training program, or no change from a special education program), procedural due process should be required. The *PARC* or *Mills* procedures should be used as guidelines.

F. Records; Privacy and Expunction. The privacy and confidentiality of all records, data, or information on any exceptional child, whether in the possession of a state or local school agency or other service-provider, should be assured by legislation prohibiting the record keeper from making the records available to persons other than the child, his parents or guardian or their legal representative, except on a need-to-know basis (to be defined by the legislature) and in conformity with federal legislation requiring access to school and educational records and parental consent to release of information.

The legislature should set forth the right of the child, parents, guardian, or their legal representative to see, copy, and have the records explained to them. These persons should have the right to add to the records written explanations or clarifications of record entries. Finally, these persons should have the right to cause the expunction of incorrect, irrelevant, dated, or misleading information.

A violation of the privacy of the records by any person and the

refusal by any record keeper of a person's right of access, correction, or expunction should be a misdemeanor punishable under the criminal laws of the state and a statutory cause of a civil action for invasion of privacy, breach of contract, breach of fiduciary relationship, or defamation.

G. Tuition and Maintenance Subsidies. The legislature should set forth in general terms the criteria for eligibility of both exceptional children and programs in which they might be enrolled for purposes of receiving tuition-and-maintenance subsidies; the criteria should be broad enough to include all exceptional children and all programs operated by private or state or local agencies, so that the unavailability of such programs in the state will not result in the inability of exceptional children to benefit from such programs out of the state.

H. Transportation. Whenever a child is unable to obtain transportation to an appropriate special education program (whether by public or private transportation services or because of a physical disability that prevents him from using such transportation), the school district in which he is entitled to receive such education or the other state or local service-providers from whom he is entitled to receive such education, should be required to furnish him with special transportation to appropriate programs.

I. Architectural Barriers. The removal of architectural barriers in existing public or private facilities serving exceptional children should be required to be completed over a specified time.

The construction of any new facilities in which exceptional children are to be served should be prohibited if architectural barriers to their use of the facility might exist and if special modifications of the facility are not made so that they may more conveniently use it.

Equal access to equal facilities should be required, so that the facilities for special education programs are substantially the evuivalent of facilities for other educational programs.

Special teaching equipment should be required to be adequately provided for in the budgets of special education agencies.

J. Appropriate Programs. Special education agencies should be required to provide adequate and appropriate programs to all exceptional children (§§ I-A and I-D). The legislature might set forth some examples of adequacy, such as, where appropriate, bilingual education; physical, speech, and occupational therapy and training; training in self-sufficiency; and training provided as part of a regular school program, as part of a special school program, or as part of in-institutional or at-home programs.

K. Racial Percentages. If more than a specified percent age of the students enrolled in special education programs offered by any service-provider are of a racial minority, the service-provider are of a be required to proffer an explanation to the single state agency (§ III-A).

The explanation should accompany the provider's plan (§ I-D). The legislature should avoid prohibiting the inclusion of more than a certain percentage of racial minority students in special education programs.

Part III: State and Local Relationships

A. State Agency Powers. A single state-level agency ("the state agency") should be given responsibility for general control of and supervision over all state-level and local programs for exceptional children. To the extent that other agencies of state government have related specific responsibility, they should be required to coordinate their special education planning, personnel, facilities, and service-delivery with the single state agency (§§ I-D and III-D). They also should be required to submit their special education plans and budgets to the single state agency for prior approval before implementation or funding (§§ I-D and III-D).

Local school units or other local special education providers likewise should be required to coordinate their special education planning, personnel, facilities, and service-delivery with the single state agency (§§ I-D and III-D). In addition, they should be required to obtain that agency's prior approval of their special education plans and budgets. Finally, they should be subject to being preempted or displaced by direct action of the state agency or its designees if they do not comply with their own approved plans or if their plans do not receive the approval of the state agency; in such an event, the state agency should itself perform the functions of the local agency or cause them to be performed under its direct supervision.

B. Interlocal Cooperation. The sharing of planning, personnel, facilities, and fiscal capacities among state-level agencies, among local agencies, and among state and local agencies should be authorized (§§ I-D and III-D). If a state or local agency is not able to provide the appropriate services to eligible persons, the single state-level agency should be authorized to require the other agency to contract for those services from a state or local agency capable of delivering them in the geographic area most convenient to the consumer and in the most appropriate manner. To the extent that state and/or local agencies wish or are required to develop regional facilities, they should be authorized to do so.

C. Incentive and Penalty Programs. Financial incentives should be made available to local agencies by the state agency for compliance with minimum standards for types, quantity, and quality of special education programs (the minimum standards to be set by the legislature or the state agency); for example, if a local school unit or regional correctional facility has exceeded the minimum standards to the extent set by criteria previously fixed by the legislature or state agency, the stage agency should be required to award it a financial bonus in an amount similarly determined. A variation on the bonus

plan would be its converse: the reduction of state aid for failure to exceed certain minimum standards. In lieu of reduction of state aid, which might be counter-productive, the state agency might declare a local unit ineligible for a bonus for a specified time. Both bonus and penalty could be used; they are not mutually exclusive.

D. State Plan. To the extent that they are affected by it, all state-level and local agencies should be required to comply with the single state agency's plan for serving exceptional children. Noncompliance, as determined by the state agency by criteria and under procedures previously determined by the legislature or state agency, should be grounds for the state agency to take over the other agency's noncomplying special education programs.

E. Contracting with Private Service-Providers. State and local agencies should be authorized to contract with private special education facilities or providers to furnish services that the public agencies are incapable of providing on their own or by interagency cooperation. The terms of the contracts should be previously approved by the state agency before the contract is executed, thereby assuring compliance with the state plan and program evaluation (§§ I-D and III-D).

Part IV: Funding; Budgets; Appropriations

Three alternatives exist for funding educational programs for exceptional children. All funding can be furnished by the state; some can be furnished by the state and some by local governments; or all funding can be furnished by local governments only.

Each state will have already adopted certain funding patterns for regular and special education and may be hesitant to disrupt that pattern. Nevertheless, legislation may either authorize a new funding pattern, modify present patterns, or order the study of alternative patterns.

Because the incidence of exceptionality is likely to vary across the state in both quantity and type, because some areas of the state will be more or less fiscally or otherwise capable of providing services to exceptional children, and because special educational personnel are likely to be more attracted to some areas of the state than others, a substantial amount of state-level funding may be highly desirable. This funding can take several forms; for example, it could be in the form of foundation grants to assure a minimum level of funding for exceptional children, with local agencies having the power, if they wish to use it, to supplement the state minimum-foundation grant; it could be in the form of funding of all local programs for exceptional children; it could be in the form of a requirement that local agencies equalize their per capita expenditures (for operating or capital purposes, or for both) among the exceptional and unexceptional children; or it could take the form of a requirement that the local agencies make a minimum per capita expenditure for each exceptional child, without the state providing funds for that purpose. Some of these forms are not mutually exclusive.

Any state funds allocated to local agencies should be allocated on the basis of criteria that take into account the actual incidence of exceptionalities in the local agencies' jurisdictions, as determined by the annual census and registration (§ I-D), not as projected by incidence or average daily attendance data applicable to the state as a whole. Local fiscal capacity (appropriately weighted by incidence of exceptionalities) might also be a measure of the amount of state aid to be allocated.

If a local agency is found to violate any state-set criteria for funding services for exceptional children, as, for example, where a local school district does not provide equalized expenditures for unexceptional and exceptional children or does not comply with state minimum per capita expenditures for exceptional children, the state agency should be empowered to amend the local agency's budget and reallocate its funds to bring it into compliance (*see also*, § III-A, state preemption, as another sanction).

Finally, the development of a reliable source of money for state funding might be desirable, for example, by putting into a special education trust fund certain earmarked and growth-responsive tax receipts.

Part V: Manpower Development; University Programs

A. Manpower Development. Because more exceptional children undoubtedly will be served under a mandatory education act and because the more difficult exceptionalities will be required to be dealt with, the training of new and the retraining of existing personnel should be planned for at the state level.

For example, the state plan probably will project that there will be an increase in the number of teachers of the moderately, severely, and profoundly retarded, the physically disabled, and the autistic; these teachers might include the traditional classroom teachers, as well as physical therapists, occupational and vocational therapists, psychologists, and various types of teacher aides or resource persons. Programs for training these new teachers should be authorized and funded.

In addition, persons already in the school systems (whether serving as special education teachers, regular program teachers, principals, or superintendents) may need to be retrained so that they will develop capacities to accommodate the policy preference for mainstreaming. Programs to accomplish this goal should be authorized and funded.

Pilot programs in manpower or curriculum development may be desirable or necessary. They, too, should be authorized and funded.

B. University Programs. University-based training of educators, both in special and regular education, will have to be reshaped to take into account the fact that education for exceptional children will require the training of greater numbers and types of persons to work with a greater variety and severity of exceptionality than previously.

This may mean that the legislature would want to maximize university programs by requiring universities to undertake joint training programs and enlarge their inservice training programs. It also may mean appropriating funds to the universities to enable new faculty positions to be created or present faculty to be retrained.

Finally, the development of technical assistance programs within the existing state or local agencies or university systems should be authorized.

Part VI. Advocacy and Accountability Mechanisms

A. Public Advocacy Groups. The legislature may want to create a permanent legislative committee on exceptional children; this committee would function in the same manner as any other standing committee and could serve advocacy and accountability functions.

The legislature may also want to create various advisory committees for state agencies, such as a committee on programs for the autistic that would serve in an advisory capacity to the state agency. The advisory committees could consist of representatives from state and local agencies charged with delivering services to the autistic, parents or private groups representing the needs of the autistic, and professional specialists in autism.

B. Private Advocacy Groups. The legislature may want to provide a system whereby private advocacy groups are given an opportunity for participating in public agency decisions; various forms of citizen participation can be authorized.

Part VII: Federal and Private Funds and Programs

State and local agencies should be authorized to receive federal and private funds and to cooperate with federal and private organizations in providing special educational services.

Part VIII: Appropriations

Since the effectiveness of state policy and state and local programs directly (but not exclusively) correlates with their level of funding, appropriations for them, based on the state plan (§§ I-D and III-D), will be necessary. It is likely that requests for appropriations, especially in the early years of compliance with right-to-education legislation, will be significantly higher than such requests for special education have been in past years and than requests for other education programs are in current years. After the start-up programs are underway, the relative difference in education budgets will be less marked.

TABLE OF CASES

Association for Mentally Ill Children v. Greenblatt, Civ. No. 71-3074-J (D.C. Mass., filed Dec. 30, 1971).

Brandt v. Nevada, Civ. No. R-2779 (D. Nev., filed Dec. 22, 1972).

Brown v. Board of Educ., 347 U.S. 483 (1954).

Burnham v. Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972), *appeal filed* No. 72-3110 (5th Cir. Oct. 5, 1972).

Colorado Ass'n for Retarded Children v. Colorado, ____ F. Supp. ____ (D. Colo., June 14, 1974).

David P. v. State Dep't of Educ., Civ. No. 658-826 (S.F. Super. Ct., filed April 9, 1973).

Diana v. State Bd. of Educ., C-70-37 R.F.P. (N.D. Cal. Jan. 7, 1970 and June 18, 1972).

Doe v. Milwaukee Bd. of School Directors, Civ. No. 377-770 (Cir. Ct., Milwaukee County, 1970).

Douglas v. California, 372 U.S. 353 (1963).

Flaherty v. Connors, 319 F. Supp. 1284 (D. Mass. 1970).

Florida Ass'n for Retarded Children v. State Bd. of Educ., Civ. No. 73-250-250 (S.D. Fla., filed Feb. 5, 1973).

Frontiero v. Richardson, 411 U.S. 677 (1973).

Graham v. Richardson, 403 U.S. 365 (1971).

Guadalupe Org. v. Tempe Elem. School Dist. No. 3, Civ. No. 71-435 (D. Ariz. 1972).

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972).

Held, In re, Nos. H-2-71 and H-10-71 (Fam. Ct., Westchester Cty., N.Y., filed Nov. 29, 1971).

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

In the Interest of G.H., Civ. No. 8930 (N.D., filed April 30, 1974).

Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

Lau v. Nichols, 94 S. Ct. 786 (1974).

LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

Levy v. Louisiana, 391 U.S. 68 (1968).

Loving v. Virginia, 388 U.S. 1 (1967).

Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972).

Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., filed May 3, 1974).

Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

N.Y.A.R.C. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

North Carolina Ass'n for Retarded Children v. North Carolina, Civ. No. 3050 (E.D.N.C., filed May 18, 1972).

Panitch v. Wisconsin, Civ. No. 72-C-461 (E.D. Wis., filed Aug. 14, 1972).

Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972).

Rainey v. Watkins, Civ. No. 77620-2 (Ch. Ct., Shelby Cty., filed April 5, 1973).

Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971).

Robinson v. California, 370 U.S. 660 (1962).

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

Serna v. Portales, 351 F. Supp. 1279 (D.N.M. 1972).

Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971).

Shapiro v. Thompson, 394 U.S. 618 (1969).

Stewart v. Phillips, Civ. Act. No. 70-1199-F (D. Mass., filed Sept. 14, 1970).

Tidewater Ass'n of Autistic Children v. Tidewater Bd. of Educ., Civ. No. 426-72-N (E.D. Va. Dec. 26, 1972).

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974).

Wisconsin v. Constantineau, 400 U.S. 433 (1971).

Wolf v. Legislature of Utah, Civ. No. 182464 (3d Dist., Salt Lake Cty., Jan. 8, 1969).

Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) and 344 F. Supp. 387 (M.D. Ala. 1972), *appeal filed sub nom.* Wyatt v. Anderholt, No. 72-2634 (5th Cir. Aug. 1, 1972).